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# THE LAW OF REAL PROPERTY

BEING

A COMPLETE COMPENDIUM OF REAL ESTATE LAW, EMBRACING ALL  
CURRENT CASE LAW, CAREFULLY SELECTED, THOROUGHLY  
ANNOTATED AND ACCURATELY EPITOMIZED; COMPARA-  
TIVE STATUTORY CONSTRUCTION OF THE LAWS  
OF THE SEVERAL STATES; AND EXHAUST-  
IVE TREATISES UPON THE MOST IM-  
PORTANT BRANCHES OF THE  
LAW OF REAL PROPERTY

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EDITED BY

EMERSON E. BALLARD

EDITOR OF

"DEED FORMS ANNOTATED," AND ONE OF THE AUTHORS OF "BALLARDS' REAL ESTATE  
STATUTES OF INDIANA," "BALLARDS' REAL ESTATE STATUTES OF KEN-  
TUCKY," "BALLARDS' OHIO LAW OF REAL PROPERTY."

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VOL. 8.

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CHICAGO, ILL.  
T. H. FLOOD & CO.



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## PREFACE.

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In this the eighth volume of our serial no material departure has been made from the plan adopted and adhered to in the preceding volumes which has been endorsed the strongest by those who have used the books the longest. The futility of any unaided attempt by the busy lawyer and overworked judge to keep abreast with the growth of even so stable a branch of the Law as the Law of Real Property has stimulated us to make a special effort in editing the 3,392 cases decided since the publication of Vol. VII, and which form the basis of this volume, hoping to have it mark a perceptible improvement in the series. Cases specially valuable to the profession on account of containing learned discussions of, or collations of authorities on, important topics, applying old principles to new conditions or novel situations, or construing some new statute of general importance, have all been given prominence over cases merely repeating long settled principles or citing and applying local statutes. If to each user of the book there shall be saved time and toil equal to a very small fraction of the months of patient labor which have been bestowed on its production, we shall feel that we have rendered an additional service to our generous patrons and be satisfied with our reward.

E. E. B.

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# ABSTRACTS AND ABSTRACTERS

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## EPITOME OF CASES.

**Sec. 1. Liability of examiner of abstract and sureties on abstracter's bond.** An attorney employed to examine the title to real estate is liable for damages resulting from his negligence, but such liability extends only to his employer. *Currey v. Butcher*, 37 Or. 380 (61 Pac. Rep. 631). See *Ballards' Law Real Prop.* Vol VI, §§ 10, 11. Sureties liable on the bond of an abstracter of titles, given under Kan. Laws 1889, ch. 1, to a purchaser of land, for the omission from the abstract of an outstanding mortgage on the land, are not discharged by an extension of time granted by the vendee to the vendor to make good his covenants of warranty against incumbrances contained in his deed. This act is not open to the constitutional objection of containing more than one subject in its title and does not create the business of abstracting into a public office nor constitute an abstracter a public officer. Kan. (61 Pac. Rep. 750). For an exhaustive collation of authorities on the liability of abstracters, see 72 Am. St. Rep. 315-319; *Ballards' Law of Real Prop.* Vol. VI, §§ 5-8.

**Sec. 2. Statutory provisions.** Cal. Code Civ. Proc. 1899, § 799—abstract of title in action for partition—amended. Statutes and Amendments to the Codes, 1901, p. 165. Idaho Laws 1901, p. 26 provides for the organization of trust companies with power to furnish abstracts of title and guarantee the title of real estate; and Ill. Laws 1901, pp. 128-130 provides for the organization of corporations to engage in the business of guaranteeing titles. In North Dakota the county auditor is required to attach to each abstract of title to real estate in his county presented to him a certificate of the amount of taxes due and unpaid against, or tax title affecting the land described in the abstract. Laws 1901, p. 5.



# ABUTTING OWNERS

## EPITOME OF CASES.

**Sec. 3. Title and right of abutting owners—Remedies for special injuries.** One having a mere easement to maintain a bridge across a public street cannot complain of any use of the street by the abutting owner having the fee, which does not interfere with the easement. *Peoria & E. Ry. Co. v. Attica, C. & S. Ry. Co.*, 154 Ind. 218 (56 N. E. Rep. 210). An abutting owner upon whom is imposed the duty of constructing and maintaining a sidewalk in front of his premises, may maintain an action for its injury by the negligence of another. *Parish v. Baird*, 160 N. Y. 302 (54 N. E. Rep. 724). An abutter on a street who owns the fee to the middle thereof may enjoin the unlawful erection of a structure on the street in front of his premises; but where he does not own the fee he cannot enjoin a nuisance which does not specially injure him. *H. B. Anthony Shoe Co. v. West Jersey R. Co.*, 57 N. J. Eq. 607 (42 Atl. Rep. 279). Abutting owners, injuries to whose property on account of the construction of a structure in the street are different only in degree from those suffered by the public, and who can be fully compensated in damages, cannot enjoin the erection. *Orth v. Youghiogheny Bridge Co.*, Pa. St. (42 Atl. Rep. 1100). As to abutters' rights to remove obstructions, see Nuisances. An alley between two buildings occupied as dwellings may be used by the owner of one of them who subsequently occupies it as a place of business, for purposes connected with his business which itself is not a nuisance, where he does not obstruct the alley so as to prevent its reasonable use by the other party. *Benner v. Junker*, 190 Pa. St. 423 (43 Atl. Rep. 72).

**Sec. 4. Use and obstruction of sidewalk.** No abutting property owner, no matter what the necessity of his trade, has the right to use the sidewalk in front of his neighbor's private residence for business purposes. *Benner v. Junker*,

190 Pa. St. 423 (43 Atl. Rep. 72). In New Jersey it is held by a divided court that every person occupying lands along the line of a public street has a right to obstruct the sidewalk in front thereof for a reasonable time in order to move heavy merchandise to or from his premises, provided he does so in such a way as not to interfere with its use by the public to a greater extent than is necessary for the purpose; and does not thereby become bound to furnish to the passer-by a safe passage around the obstruction. *Tompkins v. North Hudson Ry. Co.*, 63 N. J. L. 322 (43 Atl. Rep. 885). Citing, *Welsh v. Wilson*, 101 N. Y. 254 (4 N. E. Rep. 633; 54 Am. Rep. 698).

**Sec. 5. Shade trees in highway—Right of telephone company to remove branches obstructing its lines.** Where the erection of a telephone line in a highway is not an additional burden, a company which has been granted the right to erect such line may, without giving an abutting owner the opportunity to do so, cut the branches of his trees along the highway, in a proper manner, to prevent any obstruction of its wires, being answerable for any unnecessary, improper or excessive cutting. *Wyant v. Central Telephone Co.*, 123 Mich. 51 (81 N. W. Rep. 928; 47 L. R. A. 497). The court say: "It was admitted by plaintiff's counsel that the erection of a telephone line along the highway does not create an additional servitude upon abutting lands, and we need not cite authorities in support of that proposition. The right being given to erect the poles and wire, the company must of necessity have the right to remove obstructions, as the highway officers have authority to do when engaged in highway work within their jurisdiction. We may take judicial notice that poles must be set near the sides of the street or road, and that they are generally outside of the curb or ditch line, and therefore necessarily in line with the trees. Unless they are to be so high as to clear all of them, the wires must go through the trees. In cities and villages this may require the removal of large portions of the trees, if they are to go through them, and in such case it is possible that the company should use poles sufficiently high to avoid or minimize the injury to the trees, but that question is not before us under the findings. \* \* \* If the telephone

company has the right to have the branches cut, to admit stringing and operating its wires, the legislature has committed to no one, unless it be the company, the authority to do this. No one could do this satisfactorily until the wires should be strung, and, until the legislature provides otherwise, we must think that the companies may do it, being answerable for any unnecessary, improper or excessive cutting. We are convinced that it is the right of the company to cut branches in a proper case and manner, and in such case there is no liability to the abutting proprietor, who has no right to obstruct the public use of the highway."

**Sec. 6. Railroads in streets.** A railroad company owning lots abutting on a street may have an injunction against the unlawful construction of a railroad upon such street, although such company itself operates a railroad thereon without authority. *Louisville & N. R. Co. v. Mobile, J. & K. C. R. Co.*, 124 Ala. 162 (26 So. Rep. 895). The right of a railroad company occupying a street to interfere with the easements of abutting owners, which it has acquired by prescription, is limited to the actual adverse use it has made of such street, and it is liable to such owners for any enlargement of such use. *Lewis v. New York & H. R. Co.*, 162 N. Y. 202 (56 N. E. Rep. 540). In Illinois it is held that a railroad company cannot lawfully appropriate a street or highway until it condemns the abutting owner's interest, even though it is authorized by a city ordinance to lay its tracks therein, and such abutting owner may enjoin a steam railroad company from constructing and operating its railroad therein to the practical exclusion of the public, where no compensation for his interest has been made, even though the company is acting under a city ordinance. *O'Connell v. Chicago Terminal Transfer R. Co.*, 184 Ill. 308 (56 N. E. Rep. 355). Where a property owner who seeks to enjoin a railway company from using its tracks upon a street in front of his premises, has permitted the company to expend large sums of money in the construction of its tracks, and has acquiesced in their use for a considerable number of years without objection or complaint, such acquiescence will deprive him of relief by injunction, regardless of what his original equities may have been. *Ferguson v. Covington & C. El. R. & T. & B. Co.*,

Ky. (57 S. W. Rep. 460). In case of a change by a municipality of the grade of a street on which is located a railroad, it should not be compelled to bear the burden of grading the entire width of the street, but only the cost of conforming its tracks to the new grade and whatever additional expense results from the presence of its tracks. *Lake Shore & M. S. Ry. Co. v. City of Franklin*, 193 Pa. St. 496 (44 Atl. Rep. 583).

**Sec. 7. Railroads in streets—Power of municipalities—Contracts, ordinances and statutes.** The grant of municipal authority to a railroad company to construct its road in a street does not relieve it of liability to an abutting lot owner for damages resulting to him from its construction and operation, *Guinn v. Ohio River R. Co.*, 46 W. Va. 151 (33 S. E. Rep. 87; 76 Am. St. Rep. 806); nor does it give the company the exclusive right to use such street so that it can enjoin the construction of a street railroad track along the street or across its track, *General Elec. Ry. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588 (56 N. E. Rep. 963). An ordinance giving a railroad company the right to lay a side track in an alley twenty feet wide and permitting it to stand cars thereon for twelve hours at a time, for the convenience of the abutting owners on one side of the alley, contemplates an unwarranted obstruction of a public highway, and will not be sustained over the objection of other abutting owners. *Corby v. Chicago, R. I. & P. Ry. Co.*, 150 Mo. 457 (52 S. W. Rep. 282). See opinion for exhaustive collation of Missouri cases on this subject. Ala. Laws 1894-95, p. 382 does not authorize a city council to grant to a railroad company a franchise to construct its tracks in the streets of the city. *Louisville & N. R. Co. v. Mobile, J. & K. C. R. Co.*, 124 Ala. 162 (26 So. Rep. 895). A city granting to a railroad company the right to lay its tracks in a street, in pursuance of a petition by the abutting owners, under Ill. Rev. Stat., ch. 24, art. 5, §1, cannot extend the duration of the privileges beyond or upon conditions to the prejudice of such lands owners, to a broader extent than authorized by their petition; nor can the railroad make its operations and improvements under such unauthorized extension a ground of estoppel against them. *City of Chester v. Wabash, C. & W. R. Co.*, 182 Ill. 382 (55 N. E. Rep. 524).

Construing and applying Ind. Rev. Stat. 1894, § 5153 (Rev. Stat. 1901, § 5153), giving to any railway company general power "to construct its road upon or across any stream of water, water-course, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or water-course, road or highway, thus intersected, to its former state, or in a sufficient manner not to necessarily impair its usefulness or injure its franchises," does not give a railway company the right to construct its road longitudinally on the streets without the consent of the municipality controlling them; but such municipality under its general power has authority to grant this privilege to the railway company, provided that the use does not destroy or unreasonably impair the street as a highway for the general public. *Town of Newcastle vs. Lake Erie & W. R. Co.*, 155 Ind. 18 (57 N. E. Rep. 516). A statute (S. C. Laws 1894, p. 1002, §14) authorizing the council of a city to close, widen or alter a street by condemnation in case the abutting owners refuse consent, does not authorize it to permit a railroad company to lay its tracks in the street, where consent was refused, without condemnation and compensation. *Wilkins v. Town Council of Graffney City*, 54 S. C. 199 (32 S. E. Rep. 299). For construction of particular contract between a railroad company and a city authorizing the use of its streets by the railroad company, see *Chicago, M. & St. P. Ry. Co. v. City of Chicago*, 183 Ill. 341 (55 N. E. Rep. 648).

**Sec. 8. Railroads in streets—Recovery of damages by abutting owners.** An abutting owner cannot recover for smoke and cinders which would not fall upon his property except by the force of the wind. *Covington & C. El. R. T. & B. Co. v. Kleimeier*, Ky. (49 S. W. Rep. 484; 20 Ky. Law Rep. 1415). In ascertaining damage to a lot occupied by a mill from permanent injury on account of the construction of a railroad in a street, the measure of damage is the difference in value of the lot immediately before and immediately after the construction of the road; and the increased wholesale trade consequent upon the increased facility of shipment from the mill by reason of the

road may be set off against the loss of local retail trade, in fixing the measure of damages. *Guinn v. Ohio River R. Co.*, 46 W. Va. 151 (33 S. E. Rep. 87; 76 Am. St. Rep. 806). The principle stated in the first proposition is supported by *Covington & C. El. R. T. & B. Co. v. Kleimeier*, Ky.

(49 S. W. Rep. 484; 20 Ky. Law Rep. 1415). For particular case determining the measures of damages to abutting property on account of the construction of a railroad in the street, see *Chesapeake & O. R. Co. v. Smith*, Ky. (51 S. W. Rep. 12; 21 Ky. Law Rep. 175).

**Sec. 9. Railroads in streets—Right of abutting owner to recover damages for the closing of a street not immediately in front of his premises.** An abutting owner cannot recover damages from a railroad for its closing a part of the street not immediately in front of his premises, which closing is made to dispense with a grade crossing and under order of railroad commissioners having authority in such matters, where his easement of access immediately in front of his premises is not interfered with, although access to his property is more circuitous and inconvenient. *Newton v. New York, N. H. & H. R. Co.*, 72 Conn. 420 (44 Atl. Rep. 813). The court say: "The plaintiff's land abuts on the highway called 'Union Street.' She has in that highway certain rights in common with all others of the community. For any injury to these rights she could not bring a private action. *Clark v. Saybrook*, 21 Conn. 314. She has also the other rights in that highway as an abutting owner which we have mentioned, and which may be spoken of collectively as the 'easement of access.' It is an easement upon an easement. The abutting land is the dominant estate, and the land in the highway, where the public easement of passing and repairing exists, is the servient estate. These two uses may well exist together. 'This easement of access includes the right of ingress, egress and regress,—a right of way from a locus a quo to the locus ad quem, and from the latter forth to any other spot to which the party may lawfully go, or back to the locus a quo.' *Somerset v. Railway Co.*, 46 Law T. (N. S.) 884. The character of this easement, and the relation of the estates between which it exists, show that it is confined to the street in front of the lot, and that a remote

obstruction, if it does not affect the easement of the access at that place, is not a legal injury or tort, even though the access be rendered more inconvenient, or a more circuitous route be necessitated. And such we understand to be the law. The cases are very numerous, and are substantially unanimous to that effect. *Smith v. City of Boston*, 7 Cush. 254; *Castle v. Berkshire Co.*, 11 Gray, 26; *Davis v. Commissioners*, 153 Mass. 218 (26 N. E. Rep. 848; 11 L. R. A. 750); *Hammond v. Commissioners*, 154 Mass. 509 (28 N. E. Rep. 902); *Stanwood v. City of Malden*, 157 Mass. 17 (32 N. E. Rep. 702; 16 L. R. A. 591); *Rand v. City of Boston*, 164 Mass. 354 (41 N. E. Rep. 484); *Gerhard v. Commissioners*, 15 R. I. 334 (5 Atl. Rep. 199); *Coster v. Mayor, etc.*, 43 N. Y. 414; *Fearing vs. Irwin*, 55 N. Y. 486; *McGee's Appeal*, 114 Pa. St. 470 (8 Atl. Rep. 237); *Barr v. City of Oskaloosa*, 45 Ia. 275; *Heller v. Railroad Co.*, 28 Kan. 625; *City of Chicago v. Union Bldg. Ass'n*, 102 Ill. 379 (40 Am. Rep. 598); *Dantzer v. Railway Co.*, 141 Ind. 604 (39 N. E. Rep. 223; 50 Am. St. Rep. 343; 34 L. R. A. 769); *City of East St. Louis v. O'Flynn*, 119 Ill. 200 (10 N. E. Rep. 395; 59 Am. Rep. 795); *Polack v. Trustees*, 48 Cal. 490; *Kimball v. Homan*, 74 Mich. 699 (42 N. W. Rep. 167); *Dill. Mun. Corp.* (4th Ed.) § 666."

**Sec. 10. Street railroads.** In Illinois it is held that the allegation of an abutting property owner that the construction and operation of a street railway in front of his property will lessen its value, or injuriously affect it, or the allegation that the construction of a street railway in the street is illegal or unauthorized, will not give such abutting property owner a standing in a court of equity to enjoin the construction of such road. *General Electric Ry. Co. v. Chicago & W. I. R. Co.*, 184 Ill. 588 (56 N. E. Rep. 963). Ill. Rev. Stat., ch. 24, art 5, § 2, par. 25; ch. 131a, § 2, construed and applied—power of city council to establish and change location of street railway—condemnation of land for. *Harvey v. Aurora & G. Ry. Co.*, 186 Ill. 283 (57 N. E. Rep. 857). Ky. Const., § 242, providing that "municipal and other corporations and individuals invested with the privileges of taking private property for public use shall make just compensation for property taken, injured or destroyed by them," does not give the owner of property

abutting on a city street near a street railway turntable the right to recover damages resulting from its location and operation by reason of noises, smells and disturbances that are reasonably incidental to the operation of a street railway in a city, and borne by the public generally; but he may recover any substantial damages to his property caused by such factors so far as they are not fairly incident to the usual operation of such a street railway and borne by the property owners generally along the line. *Louisville Ry. Co. v. Foster*, Ky. (57 S. W. Rep. 480; 50 L. R. A. 813). The written consent of abutting property owners to the construction of a surface street railroad, the obtaining of which is required by N. Y. Laws 1890, ch. 565, § 91, may be given by such owners to the promoters of a prospective corporation, their assigns and legal representatives, and by them transferred to a corporation organized to build the road. *Geneva & W. Ry. Co. v. New York Cent. & H. R. R. Co.*, 163 N. Y. 228 (57 N. E. Rep. 498). For collation of authorities on "Injury to abutting owner by laying street railway near side of street," see note in 43 L. R. A. 554-560.

**Sec. 11. Elevated railroads.** Where an elevated railroad was constructed in a street in front of leased property in such a manner as seriously to interfere with the tenant's occupancy thereof during the continuance of the lease providing that after a certain number of years of the term the future yearly rent should be determined by arbitrators, it will be presumed that arbitrators determining the rent after the construction of the road will consider injurious effects thereof on the property and fix the rent accordingly; and for this reason the lessor may recover damages occasioned to the property by the construction of the road, including injuries both to the reversion and during the term of the lease. *Kernochan v. Manhattan Ry. Co.*, 161 N. Y. 339 (55 N. E. Rep. 906).

**Sec. 12. Change of grade—Municipal liability—Statutes construed.** In Kentucky a city is liable to an abutting owner for damages resulting to his property from its changing the grade of a street. *City of Louisville v. Hegan*, Ky. (49 S. W. Rep. 532; 20 Ky. Law Rep. 1532). The



establishment of a street grade, although the change may result in consequential damages to the abutting property, is not a "taking," within the meaning of Or. Const., art. I, § 18, providing that "private property shall not be taken for public use." *Brand v. Multnomah Co.* Or.

(60 Pac. Rep. 390; 50 L. R. A. 389). See *Ballards' Law Real Prop.*, Vol. VI, § 55. An abutting owner who shows that, on account of a change in the grade of a street, his property was made more difficult of access, and that a retaining wall was made necessary, and certain of the shade trees, in the street, but not obstructing travel, were injured or destroyed, shows a right to recover damages. *Richardson v. City of Webster City*, 111 Ia. 427 (82 N. W. Rep. 920). A change in the grade of a street, which leaves the buildings erected on an abutting lot with reference to a previously established grade as convenient of access and use as before the change, and does not otherwise diminish the market value of the property, is not an appropriation of the easement, or of any property right of the owner of the lot, which entitles him to compensation in consequence of the change of grade. *Lotze v. City of Cincinnati*, 61 O. St. 272 (55 N. E. Rep. 828).

**Sec. 13. Change of grade—Measure of damages.** The measure of damages for injury to abutting property by a change in the grade of a street is the difference between what the property was fairly worth in the market immediately before the damage and what it was worth immediately thereafter, *Richardson v. City of Webster City*, 111 Ia. 427 (82 N. W. Rep. 920); *McCray v. Town of Fairmont*, 46 W. Va. 442 (33 S. E. Rep. 245); *City of Louisville v. Hegan*, Ky. (49 S. W. Rep. 532; 20 Ky. Law Rep. 1532); without regard to the character of the abutting owner's interest in the land, *Steam Sawmill Co. v. City of New Haven*, 72 Conn. 288 (44 Atl. Rep. 233). In determining the damage to property on account of the change in the grade of a street the jury may consider feasible methods of using the property, in order to see how it would be affected by the change in the grade to the use to which it would be likely to be put, and in this connection a statute passed after the change of grade fixing a plan for the laying out and grading of streets may be considered. *Dana v.*

City of Boston, 176 Mass. 97 (57 N. E. Rep. 325). An abutting owner seeking to recover for damages to his property on account of the change in the grade of the street is not entitled to recover the cost of making alterations in the property, unless such alterations have been rendered necessary by the change of grade in order to make the premises as convenient of access and use as before; and in estimating the damage to abutting property by a change of grade of a street, it is proper to take into account the incidental local benefits thereby accruing to the property, such as improved light and ventilation afforded the buildings, and increased facilities for carrying on the business for which the buildings are used. *Lotze v. City of Cincinnati*, 61 O. St. 272 (55 N. E. Rep. 828). Conn. Gen. Stat., § 2703, construed and applied—recovery of damages for change of grade in highway—evidence admissible. *McGar v. Borough of Bristol*, 71 Conn. 652 (42 Atl. Rep. 1000). As to evidence admissible in an action for change of grade, see *Richardson v. City of Webster City*, 111 Ia. 427 (82 N. W. Rep. 920).

**Sec. 14. Alteration or vacation of street.** An abutting owner cannot recover damages for the diminution in the value of his premises resulting from the municipality narrowing the street, where his means of ingress and egress and supply of light and air are not impaired. *Brown v. Board of Sup'rs*, 124 Cal. 274 (57 Pac. Rep. 82). Pa. Const., art. 16, § 8, construed and applied—right of nonabutting owner to recover for damages to his property resulting from the construction or enlargement of a highway by a municipality. *In re Chatham St.*, 191 Pa. St. 604 (43 Atl. Rep. 365). A city cannot vacate a street by contract. *City of Ashland v. Chicago & N. W. Ry. Co.*, 105 Wis. 398 (80 N. W. Rep. 1101). As to the power of the city of St. Louis, Missouri, under its charter, to vacate streets, and who may object thereto and what are sufficient grounds for setting aside an ordinance vacating a street, see *Knapp, Stout & Co. Company v. City of St. Louis*, 153 Mo. 560 (55 S. W. Rep. 104); *Knapp, Stout & Co. Company v. City of St. Louis*, 156 Mo. 343 (56 S. W. Rep. 1102).

**Sec. 15. Assessments against abutting owners for municipal improvements—Constitutionality of statutes—"Frontage" system—Limiting to benefits to property.** The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is that the property is specially benefited by the improvement beyond the benefits common to the public, and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits, without impairing the inviolability of private property. *Walsh v. Barron*, 61 O. St. 15 (55 N. E. Rep. 164; 76 Am. St. Rep. 354); *Hutcheson v. Storrie*, 92 Tex. 685 (51 S. W. Rep. 848; 45 L. R. A. 289; 71 Am. St. Rep. 884). For further discussion of this subject, see *Schroder v. Overman*, 61 O. St. 1 (55 N. E. Rep. 158; 47 L. R. A. 156). Property is not taken without due process of law by an assessment for a local improvement, under Ind. Laws 1889, p. 237; Burns' Rev. Stat., 1894, §§ 4289-4294 (Rev. Stat. 1901, § 4289-4294) [the Barrett Law], authorizing an estimate of the assessments on the basis of frontage, but providing for a hearing of persons aggrieved before the assessment is made, as this provision impliedly authorizes and requires an adjustment of the assessments in conformity with the actual benefits| Baker Jr., dissenting. See opinions for exhaustive discussion and construction of this statute. *Adams v. City of Shelbyville*, 154 Ind. 467 (57 N. E. Rep. 114; 49 L. R. A. 797; 77 Am. St. Rep. 484). The same is held in *City of Indianapolis v. Holt*, 155 Ind. 222 (57 N. E. Rep. 966), construing and applying Ind. Laws 1895, pp. 273, 280, §§ 59, 74 (Rev. Stat. 1901, §§ 3963, 3978). A town may be enjoined from entering into a contract for the improvement of a street at a sum largely in excess of the total benefits accruing therefrom to the abutting property, and by which it proposes to assess the total cost of the improvement equally to each front foot, irrespective of the question of benefits accruing from the improvement, where it is alleged that the benefits to the several abutting lots will be unequal and that to some of the lots no benefit will result. *McKee v. Town of Pendleton*, 154 Ind. 652 (57 N. E. Rep. 532). But the collection of an assessment against abutting property for improvements should not be enjoined

simply because the proceedings of the council in enacting the ordinance and levying the assessment do not show affirmatively that the question of benefit to the land was taken into consideration in levying the assessment, where, in the action, it clearly is shown that the question of benefits was considered. *Schroder v. Overman*, 61 O. St. 1 (55 N. E. Rep. 158; 47 L. R. A. 156). In New Jersey it is held that a uniform assessment, arbitrarily imposed by the lot on all property affected in the same way by a public improvement, will not be sustained, if the advantages to the lots vary; and an assessment of lots for public improvement, clearly proved to exceed the benefits thereby conferred on the property, will be set aside. *State v. Mayor of City of Bayonne*, 63 N. J. L. 202 (42 Atl. Rep. 773). Ohio Rev. Stat., §§ 2271, 2272; 91 Ohio Laws, p. 428, construed and applied—limitation of municipal assessments to 25 per cent. of the value of the property. *Hays v. City of Cincinnati*, 62 O. St. 116 (56 N. E. Rep. 658).

**Sec. 16. Assessments against abutting owners for municipal improvements—Property subject to and purposes for which assessments may be made.** Abutting lots on both sides of a street may be assessed for improvements of only a lateral half thereof. *Indianapolis & V. R. Co. v. Capitol Pav. & Const. Co.*, 24 Ind. App. 114 (54 N. E. Rep. 1076). The right of way of a railroad abutting upon or bordering on a city street may be assessed to pay for street improvements; but a railroad wholly within a street is not liable to such assessment, where the city charter authorizes it to assess only lots or lands abutting or bordering on the street. *Indianapolis & V. R. Co. v. Capitol Pav. & Const. Co.*, 24 Ind. App. 114 (54 N. E. Rep. 1076). Property abutting on that part of a street forming the approach to a viaduct constructed by a railroad company in the street, is not subject to assessment to pay for paving the same where the ordinance under which the company constructed the viaduct provided that it should "maintain and keep in repair the approach thereto." *McFarlane v. City of Chicago*, 185 Ill. 242 (57 N. E. Rep. 12). A right of way of a railroad company through which it operates its road by means of an underground tunnel, the surface not being used for railroad purposes except for one ventilating shaft and the

shanty of an employe who watched the same, is subject to assessments for municipal improvements, in the absence of any evidence of the intention of the company to open the tunnel upward. *Morris & E. R. Co. v. Mayor of Jersey City*, 64 N. J. L. 148 (44 Atl. Rep. 937). A statute (Mass. Stat. 1895, ch. 186) authorizing the assessment of the cost of street sprinkling against abutting property is constitutional. *Trustees of Phillips Academy v. Inhabitants of Andover*, 175 Mass. 118 (55 N. E. Rep. 841; 48 L. R. A. 550), following *Sears v. Board of Aldermen of City of Boston*, 173 Mass. 71 (53 N. E. Rep. 138; 43 L. R. A. 834). In Illinois it is held that an ordinance providing for assessment of property abutting on a street to pay for paving the same with brick is unreasonable and void, where there is a good pavement along the frontage of the property which has been in use only a few years, in the absence of evidence that the brick pavement is required in that particular locality, or would be better than the existing pavement, or that the latter is in bad condition. *McFarlane v. City of Chicago*, 185 Ill. 242 (57 N. E. Rep. 12). For construction and exhaustive discussion of the provisions of the charter of Kansas City, Missouri, in regard to the establishment of parks by assessing the cost thereof against property owners, see *City of Kansas City v. Bacon*, 157 Mo. 450 (57 S. W. Rep. 1045).

**Sec. 17. Assessments against abutting owners for municipal improvements—Miscellaneous notes.** A lien upon a street railway for a paving assessment to which the company is subject under its charter is prior to the lien of a mortgage upon the property. *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 291 (55 N. E. Rep. 745; 48 L. R. A. 41). In an action by a contractor against an abutting owner to recover an assessment for a municipal improvement made by him, such owner cannot recover either as a set off or counterclaim the damages accruing to his property on account of the making of the improvement, to which he is entitled under the constitution. *Hornung vs. McCarthy*, 126 Cal. 17 (58 Pac. Rep. 303). The owner of lands within an assessment district defined in an unconstitutional act for the improvement of a public highway, not having promoted the making of the improvement, may enjoin the collection

of an assessment to pay for such improvement in a suit for that purpose begun when an attempt is made to enforce the improvement. He is not required to begin such suit at an earlier day, though he may know of the improvement and of the intention to make the assessment. *City of Columbus v. Alger*, 44 O. St. 485 (8 N. E. Rep. 302), followed. *Lewis v. Symmes*, 61 O. St. 471 (56 N. E. Rep. 194; 76 Am. St. Rep. 428). The owner of municipal property, upon which valid assessments have been made for the purpose of a general scheme of improvement, as the laying out and grading of streets, may, in case of a failure on the part of the city to finish its work and an abandonment of the same, recover his share pro tanto of the sum so expended, in an action for money had and received. *Germania Bank v. City of St. Paul*, 79 Minn. 29 (81 N. W. Rep. 542), following *McConville v. City of St. Paul*, 75 Minn. 383 (77 N. W. Rep. 993; 43 L. R. A. 584; 74 Am. St. Rep. 508). In Ohio it is held that the lessee in possession under a lease of real property for 99 years, renewable forever, the property standing in his name for taxation, is so far the owner of such property as to authorize him to subscribe a petition for street improvements, under Rev. Stat. § 2272; and in such case the signature of the lessor to such petition is not required in order to authorize an assessment against the corpus of such property. *Village of St. Bernard v. Kemper*, 60 O. St. 244 (54 N. E. Rep. 267; 45 L. R. A. 662). A municipal corporation exercising its power to make assessments for public improvements cannot dictate to a landowner how he shall subdivide his land. *People v. Cook*, 180 Ill. 341 (54 N. E. Rep. 173). For cases construing provisions of the charter of St. Louis, Missouri, see *City of St. Louis v. Brown*, 155 Mo. 545 (56 S. W. Rep. 298); *Barber Asphalt-Pav. Co. v. Hazel*, 155 Mo. 391 (56 S. W. Rep. 449).

# ACKNOWLEDGMENTS

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## EPITOME OF CASES.

**Sec. 18. Necessity of acknowledgment and who may take.** A mortgage is good between the parties without acknowledgment. *Hess v. Trigg*, 8 Okla. 286 (57 Pac. Rep. 159). An acknowledgment, however defective, affects only the registration of a deed, and not its validity between the parties. *Staples v. Shackleford*, 150 Mo. 471 (51 S. W. Rep. 1032). The authorized deputy of an officer empowered to take acknowledgments may take acknowledgments. *Town of Gate City v. Richmond*, 97 Va. 337 (33 S. E. Rep. 615). The fact that an officer taking an acknowledgment to a deed is related to the parties making the acknowledgment does not invalidate his certificate. *McAllister v. Purcell*, 124 N. C. 262 (32 S. E. Rep. 715). An acknowledgment of a mortgage taken by one having an interest in the transaction is valid where such interest is not disclosed on the face of the instrument. *Morrow v. Cole*, 58 N. J. Eq. 203 (42 Atl. Rep. 673). A surety on a note for whose protection a mortgage is made to the payee is disqualified from taking the acknowledgment of the mortgagor, *Leonhard v. Flood*, Ark. (56 S. W. Rep. 781). A trustee in a deed of trust properly cannot take the grantor's acknowledgment. *German-American Bank v. Carondelet Real-Estate Co.*, 150 Mo. 570 (51 S. W. Rep. 691).

**Sec. 19. Who may take acknowledgment of instruments executed to corporations.** A cashier of a bank who is a notary public is not disqualified from taking the acknowledgment of the execution of a mortgage given to it where it appears that he was neither a stockholder nor director in the bank, was paid a fixed salary for his services and whatever fees he collected as notary were his individually and did not go to the bank. *Bank of Woodland v. Oberhaus*, 125 Cal. 320 (57 Pac. Rep. 1070). A notary public who is a stockholder in a building and loan association and as such,

under the plan of the association, is entitled to participate in the profits arising from loans and from other sources, is incapacitated from taking the separate examination and acknowledgment of a married woman's mortgage of her homestead to the association. *Hayes v. Southern Home Bldg. & L. Ass'n*, 124 Ala. 663 (26 So. Rep. 527). Substantially the same is held in *Bexar Bldg. & L. Ass'n v. Heady*, 21 Tex. Civ. App. 154 (50 S. W. Rep. 1079); but in Tennessee it is held that an acknowledgment of a deed of trust executed to a building and loan association is not void because taken before a notary public who is a director of the association and its attorney or secretary. *Home Bldg & L. Ass'n v. Evans*, Tenn. (53 S. W. Rep. 1104); *Kennedy v. Security Bldg. & Sav. Ass'n*, Tenn. (57 S. W. Rep. 388).

**Sec. 20. Form and sufficiency of certificate—Curative statutes.** A substantial, and not a literal, compliance with the statutory requirements in a certificate of acknowledgment to a deed or mortgage of real estate is all that the law requires; and although words not in the statute are used in the place of others, or words in the statute are omitted, yet if the meaning of the words used is the same, or they represent the same fact, or if the omission of a word or words is immaterial, or can be supplied by a reasonable and fair construction of the whole instrument, the acknowledgment will be held sufficient. *Garton v. Hudson-Kimberly Pub. Co.*, 8 Okla. 631 (58 Pac. Rep. 946). The presumption that an officer authorized to take acknowledgments acts regularly and within the limits of his territorial jurisdiction will sustain a certificate of acknowledgment the venue of which is designated only by giving the name of the officer's state, where the court has judicial notice of his official character and of his term of office. *McCarver v. Herzberg*, 120 Ala. 523 (25 So. Rep. 3). Citing, *Carpenter v. Dexter*, 8 Wall. 528; *Rackleff v. Norton*, 19 Me. 274; *Bradley v. West*, 60 Mo. 33; *People v. Snyder*, 41 N. Y. 397. Ark. Laws 1891, p. 72, providing that "all conveyances and other instruments of writing which have heretofore been recorded in any county in this state, the proof of execution whereof is insufficient because the officer certifying such execution omitted any words in



his certificate, \* \* \* or is otherwise informal, shall be as valid and binding as though the certificate of acknowledgment or proof of execution was in due form," validates a conveyance of a homestead invalid because defectively acknowledged by the wife. *Williamson v. Lazarus*, 66 Ark. 226 (49 S. W. Rep. 974; 74 Am. St. Rep. 91). Ark. Laws 1895, p. 37 applied—defective acknowledgment—curative statute. *Shirey v. Heath*, 67 Ark. 617 (56 S. W. Rep. 1067). A statute (Va. Laws 1893-94, p. 580) curing the defective acknowledgment of a deed and a consequent defect in the record thereof, is ineffectual to give it priority over a judgment lien acquired before the passage of the statute. *Merchants' Bank v. Ballou*, 98 Va. 112 (32 S. E. Rep. 481; 44 L. R. A. 306).

**Sec. 21. Amendment of officer's certificate.** Upon the subject of the power of an officer to amend his certificate of acknowledgment, the supreme court of Florida, in the case of *Durham v. Stephenson*, 41 Fla. 112 (25 So. Rep. 284), say: "We hold that, upon principle, when an officer has taken an acknowledgment, and made his certificate thereof, which has been delivered to and accepted by the grantee as the evidence of such acknowledgment, his power over the subject-matter ceases; and he cannot subsequently amend his certificate, or make a new one, in the absence of a reacknowledgment, or what is equivalent thereto, on the part of the grantor. The following authorities sustain this view, and the opposing decisions we think are unsound: 1 Devl. Deeds, § 542, et seq.; *Bours v. Zachariah*, 11 Cal. 281 (70 Am. Dec. 779); *Griffith v. Ventrees*, 91 Ala. 366 (8 So. Rep. 312; *Ballards' Law Real Prop.*, Vol. II, §§ 14-16; 11 L. R. A. 193; 24 Am. St. Rep. 918); *Transit Co. v. Sheedy*, 103 Pa. St. 492; *McMullan v. Eagan*, 21 W. Va. 233; *Elliott v. Piersol*, 1 Pet. 328; *Merritt v. Yates*, 71 Ill. 636 (23 Am. Rep. 128)."

**Sec. 22. Conclusiveness of certificate.** A judge's certificate of the proof before him of the execution of a deed in the manner prescribed by Mass. Pub. Stat., ch. 120, §§ 7, 8, is sufficient to admit the deed to record, but does not establish conclusively the execution of such deed as against an adverse claimant. *Ayer v. Ahlborn*, 174 Mass. 292 (54

N. E. Rep. 555). When the party executing a deed or mortgage knows that he is before an officer having authority to take acknowledgments, and intends to do whatever is necessary to make the instrument effective, the acknowledging officer's official certificate will be, in the absence of fraud, conclusive in favor of those who, in good faith, rely on it. *Council Bluffs Sav. Bank v. Smith*, 59 Neb. 90 (80 N. W. Rep. 270; 80 Am. St. Rep. 669). Applying a statute (S. Dak. Comp. Laws, § 3307) making a mortgage duly acknowledged and recorded admissible in evidence without any further proof, it is held that a certificate of acknowledgment to such an instrument made by a competent officer and supported by his uncontradicted testimony is conclusive as to the mortgagor's execution of the mortgage, although the mortgagor's signature was made by the officer for her without her express request in language for him to do so, it appearing that she was present at the execution of the instrument and assented to it. *Northwestern Loan & Banking Co. v. Jonasen*, 11 S. Dak. 566 (79 N. W. Rep. 840). See opinion for collection of authorities on conclusiveness of officer's certificate. To authorize the impeachment of a certificate of acknowledgment the proof must be clear, cogent and convincing. *Sassenberg v. Huseman*, 182 Ill. 341 (55 N. E. Rep. 346). A bare preponderance is not sufficient. *Springfield Engine & Thresher Co. v. Donovan*, 147 Mo. 622 (49 S. W. Rep. 500). Where a certificate of acknowledgment regular on its face is attacked on the ground that it is false, the validity of the certificate will be sustained, unless the proof of the falsity is clear and convincing, and establishes that fact beyond a reasonable doubt; and the unsupported testimony of the grantor is not sufficient. *Gray v. Law*, Ida. (57 Pac. Rep. 435).

**Sec. 23. Conclusiveness of certificate of married woman's acknowledgment.** While the supreme court of Missouri adheres to the rule that a married woman by parol evidence may contradict the certificate of an officer to the acknowledgment of a deed conveying her real estate, it is not inclined to extend the application of the rule, and holds that a wife who in good faith acknowledges a deed as her free act, and the officer so certifies in good faith, cannot, as against a bona fide grantee, assert that she was unlaw-

fully forced by her husband to execute the deed. *Springfield Engine & Thresher Co. v. Donovan*, 147 Mo. 622 (49 S. W. Rep. 500). See opinion for exhaustive review of authorities. A certificate of the acknowledgment of a married woman to a deed, regular on its face, cannot be impeached by her unsupported testimony that she never appeared before the certifying officer and acknowledged the instrument, in the absence of proof of collusion or fraud between the officer and the grantee in the deed. *Kennedy v. Security Bldg. & Sav. Ass'n*, Tenn. (57 S. W. Rep. 388), collating and reviewing numerous authorities. Particular evidence held insufficient to impeach a certificate of acknowledgment by a married woman. *Sassenberg v. Huseman*, 182 Ill. 341 (55 N. E. Rep. 346).

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## ADVERSE POSSESSION

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### EPITOME OF CASES.

**Sec. 24. As to what constitutes adverse possession—**  
**General principles.** Adverse possession, to give title, must be hostile and continuous for the prescriptive period. *Reuter v. Stuckart*, 181 Ill. 529 (54 N. E. Rep. 1014); *Lewis v. New York & H. K. Co.*, 162 N. Y. 202 (56 N. E. Rep. 540); *Barr v. Potter*, Ky. (57 S. W. Rep. 478); *Larsen v. Onesote*, 21 Utah 38 (59 Pac. Rep. 234). It is not essential that entry should have been made under claim of ownership, if the occupancy was with intent to claim against the true owner, *Cervený v. Thurston*, 59 Neb. 343 (80 N. W. Rep. 1048); but mere naked possession without claim of right, no matter how long asserted, will not confer title, *Baber v. Henderson*, 156 Mo. 566 (57 S. W. Rep. 719; 79 Am. St. Rep. 540). Where possession is not adverse to the true owner in its inception it does not become adverse until there has been some unequivocal conduct or claim to indicate a change in the character of the possession. *Hunnewell v. Adams*, 153 Mo. 440 (55 S. W. Rep. 95). The

basis of a claim of adverse possession must be color of title or claim of right in hostility to the owner, and, if it be based on a statutory duty, it is simply permissive, and lapse of time will not ripen it into a title. *Schrimer v. Chicago, M. & St. P. Ry. Co.*, Ia. (82 N. W. Rep. 916). Possession taken by one under a license from the owner of the legal title is not adverse to him until the occupant asserts an adverse holding, notice of which is brought home to the owner. *City of St. Joseph v. Seel*, 122 Mich. 70 (80 N. W. Rep. 987). A mere trespass by occasional entry upon land for the purpose of cutting or removing timber or grass therefrom does not constitute adverse possession. *Barr v. Potter*, Ky. (57 S. W. Rep. 478). Ala. Code 1896, § 1541, which requires persons claiming adverse possession of land to give notice thereof by filing in the probate office of the proper county a declaration of their claim, particularly describing the land, has no application to persons who enter upon land and assert adverse possession thereto under an honest claim of purchase. *Holt v. Adams*, 121 Ala. 664 (25 So. Rep. 716). For a recapitulation of the general principles of law concerning the subject of adverse possession as established by the decisions of Wisconsin, see *Illinois Steel Co. v. Budzisz*, 106 Wis. 499 (81 N. W. Rep. 1027; 82 N. W. Rep. 534; 48 L. R. A. 830; 80 Am. St. Rep. 54).

**Sec. 25. As to what constitutes adverse possession—**  
**Occupancy of land under mistaken belief that it is government land.** One buying a claim to land and taking possession thereof under the mistaken belief that it was government land, and with the intention of making a homestead of it, does not hold adversely to the true owner prior to learning his mistake. *Hunnewell v. Burchett*, 152 Mo. 611 (54 S. W. Rep. 487). To constitute adverse possession, under Hills Ann. Or. Laws, § 4, by which an adverse possession of real property for a period of ten years vests a perfect title in the possessor, as against the whole world, and gives him all the remedies incident to the possession under a written title, it is necessary that such possession be under a claim of title in the occupant and with the intention to hold against all the world; and an occupancy of land under a mistaken belief that it is a part of the public

domain, and with the expectation of acquiring title from the government, does not constitute adverse possession under the statute. *Beale v. Hite*, 35 Or. 176 (57 Pac. Rep. 322). Nor is such a possession adverse to a third person who had acquired the title of the government. *Altschul v. O'Neill*, 35 Or. 202 (58 Pac. Rep. 95), collating and discussing numerous authorities.

**Sec. 26. As to what constitutes adverse possession—**  
**Particular cases.** Proof of the occasional cutting of timber on land is not sufficient to establish adverse possession. *Robinson v. Claggett*, 149 Mo. 153 (50 S. W. Rep. 280); *Travers v. McElvain*, 181 Ill. 382 (55 N. E. Rep. 135). Adverse possession by a city of a wharf along a river is not shown by an ordinance passed by it and contracts for work in the river. *Whyte v. City of St. Louis*, 153 Mo. 80 (54 S. W. Rep. 478). A mere claim of ownership with occasional cutting and removal of timber from the land and the building of a cabin thereon, without actual residence upon the land, or without inclosing it or cultivating it, does not constitute such adverse possession of the land as a claimant thereof can add to the time he has actually resided thereon. *Barr v. Potter*, Ky. (57 S. W. Rep. 478). Where a devisee accepts the provisions of the will, and goes into the possession of the land devised to her, by permission of the executor, and upon the understanding that the land will be surrendered when needed to pay debts, and such relation is never repudiated, such possession is not adverse in point of fact. *Jones v. Shomaker*, 41 Fla. 232 (26 So. Rep. 191). One who, under a claim of sole ownership of a lot of wild land, has for over 20 years made partial clearings on portions of the lot, but whose occupation has been somewhat casual and intermittent, connected a good deal with lumbering operations, does not thereby effect a disseisin of the true owners, who stand in relation of cotenants with him; nor is his claim of title made any better by tax deeds from the state or county, which are defective, and thereby void. *Fleming v. Katahdin Pulp & Paper Co.*, 93 Me. 110 (44 Atl. Rep. 378). Possession of a part of a city street by a railroad company acquired under a resolution of the city council, reciting that the land entered upon, at the time, was owned by the city, does not become adverse by the com-

pany, while recognizing the title of the city, taking a conveyance from one having a reversionary interest in the fee of the land, where no notice of an adverse claim of title is given by the company to the city. *Lewis v. New York & H. R. Co.*, 162 N. Y. 202 (56 N. E. Rep. 540). For particular acts held to constitute adverse possession of land, see *Holt v. Adams*, 121 Ala. 664 (25 So. Rep. 716); in a new country, *Dickinson v. Bales*, Kan. (61 Pac. Rep. 403); under *Ida. Rev. Stat.*, § 4043, *Urquide v. Flanagan*, Ida. (61 Pac. Rep. 514). Particular facts held insufficient

to show that the possession of a father who was a tenant in common with his sons and also their guardian was adverse as to their interests. *Brown v. McKay*, 125 Cal. 291 (57 Pac. Rep. 1001). For particular fact cases in which title is held to be acquired by adverse possession, see *Virginia M. R. Co. v. Barbour*, 97 Va. 118 (33 S. E. Rep. 554).

**Sec. 27. Proof of adverse possession.** The burden of proving all the facts necessary to constitute adverse possession is upon the one who asserts it, for, in the absence of such proof, possession is presumed to be in subordination to the true title. *Lewis v. New York & H. R. Co.*, 162 N. Y. 202 (56 N. E. Rep. 540). Notorious occupancy is one of the elements necessary to constitute a title by adverse possession, but such occupancy is not to be inferred from notoriety of claim, *Carter v. Clark*, 92 Me. 225 (42 Atl. Rep. 398); but unexplained occupancy of land continued for the prescriptive period raises the presumption that such occupancy was under claim of right and adverse, *Bishop v. Bleyer*, 105 Wis. 330 (81 N. W. Rep. 413); *Illinois Steel Co. v. Budzisz*, 106 Wis. 499 (81 N. W. Rep. 1027; 82 N. W. Rep. 534; 48 L. R. A. 830; 80 Am. St. Rep. 50). Adverse possession cannot be proved by less evidence when the entry is under color of title than when it is not. *Merwin v. Morris*, 71 Conn. 555 (42 Atl. Rep. 855). In showing occupancy of timbered land forming a part of a farm it is sufficient to show that it has been occupied for any purpose connected with farm usage. *Henry v. Henry*, 122 Mich. 6 (80 N. W. Rep. 800). In determining the existence of an adverse possession, it is proper to consider all open acts of ownership, such as selling the land and not accounting for the proceeds, paying taxes, erecting thereon permanent im-

provements under a claim of right, and all the acts and declarations of the person in possession showing that he claimed to be the sole owner. *Pepper v. Pepper*, 2 Marv. (Del.) 221 (43 Atl. Rep. 90).

**Sec. 28. Color of title—Necessity of and what constitutes.** Color of title is not essential to adverse possession. *Murray v. Romine*, 60 Neb. 94 (82 N. W. Rep. 318). Persons entering under surveys or junior grants do so under color of title. *Middlesborough Waterworks Co. v. Neal*, Ky. (49 S. W. Rep. 428; 20 Ky. Law Rep. 1403). A conveyance in fee by one having no title may constitute color of title, *Allen v. Van Bibber*, 89 Md. 434 (43 Atl. Rep. 758); and a recorded plat of land made by one having no title thereto may be a sufficient basis for a claim of adverse possession, *Naureth v. Duke*, Ia. (79 N. W. Rep. 271). A deed issued in pursuance of an execution sale is sufficient as color of title whether the sale is valid or not. *Wade v. Garnett*, 109 Ga. 270 (34 S. E. Rep. 572). A deed made by a special commissioner in a chancery cause, under a decree confirming the sale purporting to convey the real estate described in the deed, gives color of title in the grantee, notwithstanding irregularities in the proceedings in such cause and sale. *Hitchcox v. Morrison*, 47 W. Va. 206 (34 S. E. Rep. 993). A certificate of redemption of land from a tax sale may constitute color of title, *Barron v. Barron*, 122 Ala. 194 (25 So. Rep. 55); but a certificate of purchase issued on a tax sale does not constitute color of title, and a tax deed subsequently issued on such certificate of purchase will not relate back so as to constitute color of title existing before the actual execution of the deed, *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538 (56 N. E. Rep. 63). A person who has purchased a soldier's "additional homestead right," and has, under proper powers of attorney, located the same, and entered into possession of the land upon which the location was made, has color of title to the entire tract described in the receiver's receipt. *Draper v. Taylor*, 58 Neb. 787 (79 N. W. Rep. 709).

**Sec. 29. Color of title—Defective and invalid instruments.** A deed invalid on account of insufficiency in the

description of the premises sought to be conveyed will not constitute color of title. *Barker v. Southern Ry. Co.*, 125 N. C. 596 (34 S. E. Rep. 701; 74 Am. St. Rep. 658); *Zilch v. Young*, 184 Ill. 333 (56 N. E. Rep. 318). The fact that a bond for title does not describe the land sufficiently to locate it definitely and exactly does not render such bond inadmissible in evidence as color of title where it otherwise is sufficient. *Tumlin v. Perry*, 108 Ga. 520 (34 S. E. Rep. 171). Construing and applying Wis. Rev. Stat., § 4211, providing that ten years adverse possession under a claim of title founded on a written instrument confers title, the supreme court of that state, in the case of *Heinselman v. Hunsicker*, 103 Wis. 12 (79 N. W. Rep. 23), say: "There can be no doubt but that a description which is hopelessly uncertain renders the deed void, and such a deed cannot be used as a basis for adverse possession under the statute cited." But in a later case construing the same statute, and following the case of *Lapman v. Van Alstyne*, 99 Wis. 417 (epitomized at length in *Ballards' Law of Real Property*, Vol. V, § 30), the same court holds that it is not necessary that the claim of title be made in good faith; nor is the claimant's right affected by the fact that the instrument under which he holds may be cancelled as invalid, for reasons known to him. *McCann v. Welch*, 106 Wis. 142 (81 N. W. Rep. 996). The court say: "Wherever the Wisconsin doctrine is maintained, no paper writing, purporting upon its face to be executed, and to convey the land, has been held insufficient to support a claim of title such as may ripen into complete ownership by possession for the statutory period. A deed void upon its face will suffice—*McMillan v. Wehle*, 55 Wis. 685 (13 N. W. Rep. 694); *Whittlesey v. Hoppenyan*, 72 Wis. 140 (39 N. W. Rep. 355);—a deed executed by a married woman who has no power to convey—*Sanborn v. French*, 22 N. H. 246; *Perry v. Perry*, 99 N. C. 270 (6 S. E. Rep. 86);—a deed ostensibly by an agent, pretending no authority—*Millen v. Stines*, 81 Ga. 655 (8 S. E. Rep. 315);—or signed by one non compos mentis—*Ellington v. Ellington*, 103 N. C. 54 (9 S. E. Rep. 208);—or by one having neither title nor possession—*Webber v. Clarke*, 74 Cal. 11 (15 Pac. Rep. 431); *Love v. Shields*, 3 Yerg. 405;—a deed secured by fraud of the grantee—*Oliver v. Pullam* [C. C.], 24 Fed. Rep. 127. In



the light of such uniform holdings we cannot doubt that the deed in question, published to the world by record, would serve as a support for the claim of title contemplated by § 4211, Rev. Stat., even though the grantee's acts in securing the same had been more meretricious than they were. We may say, parenthetically, that from the evidence we incline to the belief that the defendant, Patrick Welsh, relying on the knowledge of conveyancing which the justice of the peace was supposed to have, did in reality believe that this deed had accomplished the transfer of the title to him, although in law he doubtless had no right so to believe, and could not be said to be a bona fide holder under it, if that were necessary. The underlying idea of this statute is not reward to the diligent trespasser, but rather of penalty upon the negligent and dormant owner, who allows another for many years to exercise acts of possession over his property. The time necessary to render such occupancy effective under a deed is shortened, not in recognition of a good-faith claim by the occupant, but in recognition of the notice to the owner of the adversary character of that occupancy. More negligent is he who allows another to occupy his premises when he is notified that the occupancy is not accidental or subordinate by the exposure to him of a paper which conveys title if it is what it purports to be. The purpose of the statute is not to benefit him who fraudulently obtains such a conveyance, but to deny the use of the courts to him who negligently sleeps on his rights. The requirement of good faith in the few cases supporting it is in disregard or forgetfulness of the real purpose of statutes of adverse possession. From the foregoing, the conclusion is obvious that all of the calls of the statute are satisfied, and that, even if the deeds in controversy be now cancelled, that cannot benefit these two plaintiffs, who are fully barred from recovering the land itself. They therefore should not be permitted to maintain this action."

**Sec. 30. Extent of possession—General principles.**

Upon the subject of the extent of the possession of one claiming to hold adversely, the supreme court of Missouri, in the case of *Benne v. Miller*, 149 Mo. 228 (50 S. W. Rep. 824), say: "Where land is actually unoccupied, the constructive possession is in the owner of the true title. *Douthit v. Stin-*

son, 63 Mo. 268; *Turner v. Baker*, 64 Mo. 218 (27 Am. Rep. 226). If the true owner be in actual possession of one part of the tract, and an intruder, even though he have color of title, be in possession of another part of the same tract, and there still be another part unoccupied, the true owner will be held to be in the constructive possession of all that part not in actual occupancy; which is to say that in such case the possession of him who has color of title only is limited to that part in his actual occupancy. But, if the true owner is not in actual possession of any part, and the intruder with color of title is in possession of a part, claiming the whole, and exercising over the whole such acts of ownership as the circumstances allow, he will be held to have the constructive possession of all that his colorable title calls for. *Schultz v. Lindell*, 30 Mo. 310; *Norfleet v. Hutchins*, 68 Mo. 597; *Gaines v. Saunders*, 87 Mo. 557; *Harbison v. School Dist.*, 89 Mo. 184 (1 S. W. Rep. 30); *Land Co. v. Hays*, 105 Mo. 143 (16 S. W. Rep. 957). Where a claim to land is based on adverse possession for the statutory period without color of title, there is no constructive possession to be considered; actual possession only will avail the claimant."

One who takes actual possession to the extent of his rights as he believes them to exist, cannot claim a constructive possession beyond such bounds. *Buckley v. Mohr*, 125 Cal. XIX (58 Pac. Rep. 261). A purchaser to whom a tract of land within certain monuments is shown as the land he is purchasing, who is justified in believing that the same land was included in the deed afterward executed to him and who afterward went into and held possession of all the land within such monuments openly and notoriously for a time longer than the prescriptive period, acquires title to the whole of it as against the legal owner, although it was not all included in his deed and he disclaimed all land not included in his deed. *Bishop v. Bleyer*, 105 Wis. 330 (81 N. W. Rep. 413).

**Sec. 31. Extent of possession under color of title—**  
**Conflicting patents.** Adverse possession of land embraced in a deed containing several contiguous parcels extends to all the lands described in the deed. *Bellefontaine Imp. Co. v. Neidringhaus*, 181 Ill. 426 (55 N. E. Rep. 184; 72 Am. St. Rep. 269). To the same effect is the case of *Turnage v. Kenton*, 102 Tenn. 328 (52 S. W. Rep. 174). Mo. Rev. Stat.,

§ 6768, providing that possession, under color of title, of a part of a tract of land, in the name of the whole tract claimed, and exercising, during such possession, the usual acts of ownership over the whole, is deemed a possession of the whole, is not applicable to interlapping surveys, forming boundaries between adjacent proprietors. *Hedges v. Pollard*, 149 Mo. 216 (50 S. W. Rep. 889). Where two patents lap the junior one shrinks to the actual inclosure existing for the time necessary to give possessory title. *Caudill v. Caudill*, Ky. (52 S. W. Rep. 957; 21 Ky. Law Rep. 713). The possession of a patentee who settles within the lap of a conflicting patent extends to the entire boundary claimed by him. *Greer v. Bowling*, Ky. (55 S. W. Rep. 1081; 21 Ky. Law Rep. 1648).

**Sec. 32. Extent of possession without color of title.**

One tacking the possession of a prior occupant of premises without color of title is limited to the extent of his actual occupancy. *Wilson v. Purl*, 148 Mo. 449 (50 S. W. Rep. 90). One who without color of title enters upon a tract of unoccupied real property, and takes visible, open, and notorious possession of a part thereof, cannot extend his possession so as to embrace the whole tract, merely by obtaining color of title thereto subsequent to his entry. *Barber v. Robinson*, 78 Minn. 193 (80 N. W. Rep. 968). In Alabama it is held that title by adverse possession claimed by one entering under a verbal contract of purchase which fixed his boundaries is valid, as against persons other than his immediate vendor, only to the extent of his actual possession. *Tennessee Coal, Iron & R. Co. v. Linn*, 123 Ala. 112 (26 So. Rep. 245). *Tyson, J.*, dissents from this decision and cites to support the contrary, the following authorities: 1 Am. & Eng. Enc. Law (2nd Ed.) 848; *Tyler, E.* 863; 2 *Smith, Lead. Cas.* (8th Am. Ed.) 711; *Green v. Kellum*, 23 Pa. St. 258 (62 Am. Dec. 332); *McCall v. Neely*, 3 Watts, 72; *Tate v. Southard*, 3 Hawks, 119 (14 Am. Dec. 581, note); *La Frombois v. Jackson*, 8 Cow. 589 (18 Am. Dec. 463); *Vancleave v. Milliken*, 13 Ind. 108; *Baker v. Hale*, 6 Baxt. 48; *Teabout v. Daniels*, 38 Ia. 161; *Rannels v. Rannels*, 52 Mo. 108; *Magee v. Magee*, 37 Miss. 138.

**Sec. 33. Title by—Who may acquire and to what property.** A wife whose rights in real estate are dependent

upon those of her husband cannot divest the true owner of his title by possession for the prescriptive period, where her husband made no claim of title adverse to such owner. *Browneller v. Wells*, 109 Ia. 230 (80 N. W. Rep. 351). Title to the land of a married woman in Kentucky may be acquired by thirty years actual adverse possession. *Trail v. Turner*, Ky. (56 S. W. Rep. 645). A widow's right to dower may be barred by an adverse possession of the land for the prescriptive period by one who does not claim under the husband. *Brown v. Morrissey*, 124 N. C. 292 (32 S. E. Rep. 687). After there has been a severance of the mineral estate in land from the surface estate, the possession of either alone cannot affect the title of the other. *Catlin Coal Co. v. Lloyd*, 180 Ill. 398 (54 N. E. Rep. 214; 72 Am. St. Rep. 216).

**Sec. 34. Title by—Character of title acquired.** Continuous adverse possession of land for a period sufficient to bar an action for its recovery confers title on the adverse holder, *Adkins v. Spurlock*, 46 W. Va. 139 (33 S. E. Rep. 121); *Pepper v. Pepper*, 2 Marv. (Del.) 221 (43 Atl. Rep. 90); and such title is not divested by the fact that another person thereafter occupied the premises under a claim of right for a time less than the prescriptive period. *Cervený v. Thurston*, 59 Neb. 343 (80 N. W. Rep. 1048). One who has acquired title to land by adverse possession thereof for the prescriptive period may by deed convey a good title to his grantee. *McKay v. Gardner*, 120 Mich. 267 (79 N. W. Rep. 185). Title by adverse possession may be used not only as a defense but as a sword to attack with when the possession of the claimant is disturbed. *Kepley v. Scully*, 185 Ill. 52 (57 N. E. Rep. 187).

**Sec. 35. Title by—Accretions formed during the adverse possession.** One acquiring title to riparian land by adverse possession takes title to the accretions formed during the possession creating his title. *Bellefontaine Imp. Co. v. Neidringhaus*, 181 Ill. 426 (55 N. E. Rep. 184; 72 Am. St. Rep. 269); *Benne v. Miller*, 149 Mo. 228 (50 S. W. Rep. 824). In the last case the court say: "An accretion becomes a part of the land to which it is built, and follows whatever title covers the main land, whether it be title by deed or title by possession. In its nature it is not susceptible, during its forming, of that kind of possession which distinguishes the occupation of dry

land. But it attaches to the dry land even while it is yet under water, and belongs to the owner of the land, and is in the actual possession of him who holds the actual possession of the main land. If the main land is in fact unoccupied, it is in the constructive possession of the owner of the true title, and with it goes the constructive possession of the forming accretion. But if the main land is held in adverse possession to the true owner, he is not in constructive possession of the accretion; and, since the accretion in its formative state is not susceptible of actual occupancy in the sense of a *pedis possessio*, the indicia of the actual possession of him who holds the main land are extended over the forming accretion, and bring it within his actual possession. And it is not necessary that such possession of the accretion should be held for ten years to give the possessor title, because title to it follows title to the main land; and when the latter is held under the conditions and for the length of time required by law to vest the title in the possessor, the title to the accretion follows, even though the deposit had been made but a year or a day. One who acquires title to the main land by ten years adverse possession acquires title to river deposits made and making on his front before and during the period in which his possessory title was forming. The accretion grows into the land, and grows into the title of him who holds the land as the title itself grows, and when the title to the main land has become perfect it extends over the accretion, however recent its formation. *Campbell v. Gas Light Co.*, 84 Mo. 352."

**Sec. 36. Title by—Payment of taxes—Statutes construed.** Cal. Code Civ. Proc., § 325, construed and applied—payment of taxes by party claiming title by adverse possession—proof of payment. *Williams v. Gross*, 129 Cal. XVIII (61 Pac. Rep. 934). To confer title under 3 Mills' Ann. Colo. Stat., §§ 2923e, 2924 by five years possession of land under color of title and payment of taxes for that period, the possession must be under paper title. *Durkee v. Jones*, Colo. (60 Pac. Rep. 618); *Lower Latham Ditch Co. v. Loudon Irr. Canal Co.*, Colo. (60 Pac. Rep. 629). To confer title to land, under Ill. Rev. Stat., ch. 83, § 6, by seven years actual possession under color of title, there must be possession for the full seven years under an instrument sufficient as color of title. *Zilch v. Young*, 184 Ill. 333 (56 N. E. Rep. 318). One claiming title to vacant and unoccu-

pied land, under Ill. Rev. Stat., ch. 83, § 7, on account of the payment of taxes thereon for seven years, with color of title, must show that after the lapse of that time he took possession of the land. *Travers v. McElvain*, 181 Ill. 382 (55 N. E. Rep. 135). The provision of § 8 of this chapter that title cannot be acquired by seven years payment of taxes and adverse possession as against the state, is not applicable to lands held by a county and which it is authorized to sell, *Hammond v. Shepard*, 186 Ill. 235 (57 N. E. Rep. 867; 78 Am. St. Rep. 274). Where payment of taxes is relied upon to sustain a title by adverse possession, their payment must be established by clear and convincing testimony. *Clayton v. Feig*, 179 Ill. 534 (54 N. E. Rep. 149). Title by seven years possession and payment of taxes under a quit-claim deed is not made out where, in certain instances, the payments were made after payment by the owner. *Maher v. Brown*, 183 Ill. 575 (56 N. E. Rep. 181). The mere payment of taxes and the occasional expulsion of trespassers by one without color of title is not sufficient possession of land to form the basis of a title by adverse possession. *Sweringen v. City of St. Louis*, 151 Mo. 348 (52 S. W. Rep. 346). Under the statutes of Utah, continuous, peaceful, open, notorious and adverse possession of real estate under a claim of right, accompanied by the payment of taxes thereon, for a period of seven years, gives the claimant title. *Snow v. Rich*, Utah, (61 Pac. Rep. 336). Payment of taxes is an act of ownership, and may be proved as tending to show that the party making the same holds adversely; and in connection with such proof the claimant may show that the property was not assessed to any one else. *Carter v. Clark*, 92 Me. 225 (42 Atl. Rep. 398). The first proposition stated above is supported by *Merwin v. Morris*, 71 Conn. 555 (42 Atl. Rep. 855).

**Sec. 37. Title by—Time necessary to confer.** The length of time requisite to confer title by adverse possession is determined by the statute in force at the time the adverse possession commenced, and is unaffected by a later statute shortening the time within which title thus may be acquired. *Hodge v. Hodge*, 56 S. C. 263 (34 S. E. Rep. 517). Construing and applying Mansf. Ark. Dig., § 4476, providing that "no action for the recovery of real property, when the plaintiff does not claim title to the lands, shall be brought or maintained

when the plaintiff or his testator or intestate has been five years out of possession," it is held that when this statute begins to run against a person it continues to run against his minor heirs, upon his death. *Murray v. Houghton*, Ind. Ter. (52 S. W. Rep. 48). By Act Cong., May 2, 1890, this statute is put in force in Indian Territory, and applies to actions for the recovery of land in the Choctaw Nation. *Robinson v. Nail*, Ind. Ter. (52 S. W. Rep. 49). In Kentucky adverse possession of lands under a parol purchase for thirty years gives title. *Gilbert v. Kelly*, Ky. (57 S. W. Rep. 228). In Tennessee continuous adverse possession of land under color of title for seven years gives a perfect title. *Buttery v. Brown*, Tenn. (52 S. W. Rep. 713).

**Sec. 38. Interruption and tacking of adverse holdings—Transfer of possessions.** There can be no adverse possession of land while the title is in an infant. *Pennington v. Earley*, N. J. L. (43 Atl. Rep. 707). The continuity of the possession of one claiming to hold adversely to the real owner is broken by his conveying the land by a quitclaim deed to a third party who, on the same day, reconveys it to the claimant's wife. *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70 (56 N. E. Rep. 1088). Possession of one occupant may be tacked to that of another if one acquired possession from the other, and the possessory estates are connected and continuous. *Murray v. Romine*, 60 Neb. 94 (82 N. W. Rep. 318). There must be privity of estate or title before the several possessions of successive disseizors can be joined together, so as to be regarded as a continuous possession. *Maher v. Brown*, 183 Ill. 575 (56 N. E. Rep. 181); *Kepley v. Scully*, 185 Ill. 52 (57 N. E. Rep. 187). A claimant of land by adverse possession cannot tack to the time of his possession that of the previous holder, where the land is not included in the boundaries in the deed from such holder. *Vicksburg, S. & Pac. Ry. Co. v. Le Rosen*, 52 La. Ann. 192 (26 So. Rep. 854). Persons whose possessions are connected by deed having a defective description are in privity. *Kepley v. Scully*, 185 Ill. 52 (57 N. E. Rep. 187). The transfer of the rights of successive possessors need not be in writing. *Illinois Steel Co. v. Budzisz*, 106 Wis. 499 (81 N. W. Rep. 1027; 82 N. W. Rep. 534; 80 Am. St. Rep. 54; 48 L. R. A. 830); *Murray v. Romine*, 60 Neb. 94 (82 N. W. Rep. 318); *Holt v. Adams*, 121 Ala. 664 (25 So. Rep.

716); *Kleply v. Scully*, 185 Ill. 52 (57 N. E. Rep. 187); *Memphis & L. R. R. Co. v. Organ*, 67 Ark. 84 (55 S. W. Rep. 952), where it is held that they may be transferred by operation of law under an execution or foreclosure sale. In the first case cited above, the court say: "The authorities all agree that privity between successive possessors is all that is necessary to render them continuous, if the possession be in fact actual and adverse. That privity may be created in any way that will prevent a break in the adverse possession and refer the several possessions to the original entry. It may be created by lease, as between landlord and tenant, or by descent by operation of law from ancestor to heir, or by conveyance, either by parol or otherwise, from vendor to vendee. 1 Am. & Eng. Enc. Law (2nd Ed.) 842, and cases cited in the notes; *McNeely v. Langan*, 22 O. St. 32; *Haynes v. Boardman*, 119 Mass. 414; *Witt v. Railway Co.*, 38 Minn. 122 (35 N. W. Rep. 862); *Low v. Schaffer*, 24 Or. 239 (33 Pac. Rep. 678); *Vance v. Wood*, 22 Or. 77 (29 Pac. Rep. 73); *Crispen v. Hannavan*, 50 Mo. 536; *Weber v. Anderson*, 73 Ill. 439; *Faloon v. Simshauser*, 130 Ill. 649 (22 N. E. Rep. 835); *Menkens v. Blumenthal*, 27 Mo. 198. \* \* \* Sufficient has been said to bring out clearly the true doctrine as understood by the court, that a paper transfer is not necessary to connect adverse possessions together; that privity, successive relationships to the same thing, is the connecting link; that a paper transfer is but a means of establishing the fact of privity, but not the only evidence; that the presumption, that a person in possession of land who conveys part of it and transfers possession of the whole intended to transfer only that within the calls of his conveyance, and the presumption that a person in possession, not as owner, holds subject to the true owner, are mere rebuttable presumptions of fact that yield to any clear relevant evidence to the contrary, whether it be written, or inferential from facts established by positive evidence. *Meyer v. Hope*, 101 Wis. 123 (77 N. W. Rep. 720).

"We might almost call the roll of the courts on that doctrine. The Missouri court said: 'We know of no rule that requires written evidence to establish the fact of privity.' *Menkens v. Blumenthal*, 27 Mo. 198. The Illinois court said, that where the owner, in possession of a strip of land, together with adjoining lands, conveys the latter and transfers possession of the whole, and the grantee takes possession of the prop-



erty as an entirety, the possession of that outside the calls of the deed being actual in both possessors, the presumptions in favor of the true owner and as to the limitations of the deed give way to the facts, and privity in adverse possession is established. *Faloon v. Simshauser*, 130 Ill. 649 (22 N. E. Rep. 835). The Alabama court said, that where a person holds land adversely, outside the calls of his deed, claiming a continuity of such possession from his grantor, the presumption, that the latter only intended to create privity to the extent of the calls of the deed, may be overcome by proof that the former obtained possession of the property from the latter as a part of the land purchase, because a paper transfer to continue adverse possession in privity is not necessary. *Dothard v. Denson*, 72 Ala. 541. To the same effect are *Erck v. Church*, 87 Tenn. 575 (11 S. W. Rep. 794; 4 L. R. A. 641), and *Kendrick v. Latham*, 25 Fla. 819 (6 So. Rep. 871)."

**Sec. 39. Public property.** Title to land belonging to the state cannot be acquired by adverse possession. *Hammond v. Shepard*, 186 Ill. 235 (57 N. E. Rep. 867; 78 Am. St. Rep. 274). In Nebraska it is held without relying on Laws 1899, ch. 79 (see *Ballards' Law Real Prop.*, Vol. VI, § 876), that title to a part of a country road could not be acquired by adverse possession. *Krueger v. Jenkins*, 59 Neb. 641 (81 N. W. Rep. 844). In West Virginia it is held that the public easement in the public highways, including roads, streets, alleys, and other public thoroughfares, dedicated to the use of the general public by individuals, or under the right of eminent domain is the property of the people of the state, and that an individual cannot destroy such easement through adverse possession or an equitable estoppel. *Ralston v. Town of Weston*, 46 W. Va. 544 (33 S. W. Rep. 326; 76 Am. St. Rep. 834). See opinion for review of authorities. A railroad company cannot acquire a prescriptive right in a street by encroachment thereon. *Raht v. Southern Ry. Co.*, Tenn.

(50 S. W. Rep. 72). Possession of a platted alley, which never had been used by the public or by the village authorities, by the grantee of abutting lots and his predecessor in title, for a time longer than the prescriptive period, gives title, although such alley was not included in the literal reading of the grantee's deed. *Darrow v. Village of Homer*, 122 Mich. 229 (81 N. W. Rep. 262). Under Ky. Stat., § 2546, fifteen

years adverse possession of a street prior to Dec. 1, 1873, gives title; but in order for adverse possession of a street since that date to confer title it must continue fifteen years after notice of the adverse claim to the proper municipal authorities. *City of Cadiz v. Hillman*, Ky. (50 S. W. Rep. 49; 20 Ky. Law Rep. 1776). The acquisition of land by a railroad company for its right of way, depot and station grounds is an appropriation of land to a public use, within the meaning of Mo. Rev. Stat. 1889, § 6672, providing that "nothing contained in any statute of limitations shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this state." *Hannibal & St. J. R. Co. v. Totman*, 149 Mo. 657 (51 S. W. Rep. 412). Hill's Ann. Or. Laws, § 4, providing that an action to recover real estate cannot be maintained "unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of said action," is by § 13 made expressly applicable to actions by the state; and hence one who holds adverse possession of land granted to the state by congress for school purposes for the statutory period acquires a perfect title. *Schneider v. Hutchinson*, 35 Or. 253 (57 Pac. Rep. 324; 76 Am. St. Rep. 474; see pp. 479-494, for note exhaustively collating the authorities on adverse possession of public lands). But occupancy of public lands under a belief that they are a part of the public domain and with the expectation of acquiring title from the government does not constitute adverse possession, so as to confer title under this statute. *Beale v. Hite*, 35 Or. 176 (57 Pac. Rep. 322).

**Sec. 40. Adverse possession as between parties in privity.** The possession of the life tenant is not adverse to the remainderman. *Hanson v. Ingwaldson*, 77 Minn. 533 (80 N. W. Rep. 702; 77 Am. St. Rep. 692); *Edwards v. Bender*, 121 Ala. 77 (25 So. Rep. 1010). The possession of mortgaged premises by the mortgagee under an arrangement by which he is to pay his debt from the rents thereof, is not adverse to his mortgagor, *McGuire v. Lynch*, 126 Cal. 576 (59 Pac. Rep. 27); but possession of mortgaged premises by the mortgagee for more than forty years will be presumed to be adverse. *Tibbs v. Reed*, Ky. (49 S. W. Rep. 6; 20 Ky. Law Rep. 1208). An officer of a corporation claiming title by ad-

verse possession of property conveyed to it must show a change of possession after the conveyance and some act of hostility on his part to the title of the corporation. *Center Creek Water & Irr. Co. v. Lindsay*, 21 Utah 192 (60 Pac. Rep. 559).

An heir's possession of the lands of a decedent is not adverse to the holder of a dower estate therein, but the rule is otherwise as to the possession of a stranger or a purchaser either from the deceased owner of the fee or from the heirs. *Sill v. Sill*, 185 Ill. 594 (57 N. E. Rep. 812). The possession of a widow under her right of quarantine is not adverse to her husband's heirs. *Reuter v. Stuckart*, 181 Ill. 529 (54 N. E. Rep. 1014). During the life of a widow, notwithstanding her remarriage, neither her possession, under 1 Mo. Rev. Stat. 1855, p. 672, § 21, of her deceased husband's mansion house and the messuages and plantation thereto belonging prior to her assignment of dower, nor the possession of a purchaser under a deed made in partition proceedings which were void as to the minor heirs of her husband on account of the improper service upon them, is not adverse to them. *Westmeyer v. Gallenkamp*, 154 Mo. 28 (55 S. W. Rep. 231; 77 Am. St. Rep. 747).

**Sec. 41. Vendor and vendee—Grantor continuing in possession.** One taking and holding possession of land under a contract of purchase from another having the legal title thereto, cannot assert title against the latter by adverse possession. *Woodard v. Hennegan*, 128 Cal. 293 (60 Pac. Rep. 769). In Kentucky it is held that a vendee entering under an unenforceable parol contract of sale may by fifteen years open and notorious adverse possession of the land acquire title thereto. *Creech v. Abner*, Ky. (50 S. W. Rep. 58; 20 Ky. Law Rep. 1812). The continued occupancy by a father with his daughter of lands as a homestead after his conveyance of them to her is not adverse as to her, where no repudiation of his deed is shown. *Reed v. Smith*, 125 Cal. 491 (58 Pac. Rep. 139). In California it is held that a grantor continuing in the open, notorious, uninterrupted, adverse and exclusive possession of the granted premises, claiming the same as his own, during a period sufficient to bar an action for their recovery, thereby acquires his grantee's title. Code Civ. Proc., §§ 323-325; Civ. Code, § 1007, construed and applied. *Baker v. Clark*, 128 Cal. 181 (60 Pac. Rep. 677).

**Sec. 42. Tenants in common.** A tenant in common who holds possession of the common estate for the prescriptive period under a deed purporting to give him full title, controlling, managing and mortgaging the property as his own and taking all the income therefrom thereby acquires title as against his cotenants, *McCann v. Welch*, 106 Wis. 142 (81 N. W. Rep. 996); and where one tenant in common attempts to convey by warranty deed the whole estate in fee, and his grantee records his deed, and by virtue thereof enters upon the estate, and claims and holds exclusive possession of the whole thereof, the possession and claim are adverse to the title and possession of his cotenant, and amount to a disseisin. *Hanson v. Ingwaldson*, 77 Minn. 533 (80 N. W. Rep. 702; 77 Am. St. Rep. 692). When one tenant in common takes possession and claims the entire property by deed, his holding is adverse and limitation begins to run when he so takes possession, *O'Mara v. Lilly*, Ky. (53 S. W. Rep. 516; 21 Ky. Law Rep. 951); but mere possession and control of the common estate by one cotenant, accompanied by his payment of taxes, making improvements, and appropriating the rents to himself, no matter how long continued, alone will not bar the rights of his cotenants in the premises. *Blackaby v. Blackaby*, 185 Ill. 94 (56 N. E. Rep. 1053). The court say: "The reason of this rule is that the possession of one tenant, in contemplation of law, is the possession of the others; and this is especially so where all the parties derive title from the same deed, or from the same ancestor. The possession of one cotenant will not be adverse to the other where there is a mere possession of the premises and an appropriation of the rents. Something more is required. It is not sufficient that he continued to occupy the premises, and appropriates to himself the exclusive rents and profits, makes slight repairs and improvements on the lands, and pays the taxes, for all this may be consistent with the continued recognition of the rights of his cotenants. To constitute a disseisin, there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the cotenants that an adverse possession and an actual disseisin are intended to be asserted against them." To the same effect, see *Justice v. Lawson*, 46 W. Va. 163 (33 S. E. Rep. 102).

**Sec. 43. Conveyance of land in the adverse possession of another.** In Alabama a deed or mortgage of lands in the adverse possession of a third party is void as to him. *Chevalier v. Carter*, 124 Ala. 520 (26 So. Rep. 901); *Jackson v. Singleton*, 122 Ala. 323 (25 So. Rep. 204). A deed of land in the adverse possession of a third party is not void, but only voidable at the instance of such person, and the grantee may perfect his title by buying in the adverse claim. *Fort Jefferson Imp. Co. v. Dupoyster*, Ky. (51 S. W. Rep. 810; 48 L. R. A. 537; 21 Ky. Law Rep. 515). A deed executed while land is in the adverse possession of a third party, made to carry out written or parol contracts made at a time when the land was not so held, is not a violation of the Kentucky statute against champerty. *Middlesborough Waterworks Co. v. Neal*, Ky. (49 S. W. Rep. 428; 20 Ky. Law Rep. 1403). The possession of a grantor's tenant is not adverse, within the meaning of the Kentucky champerty act. *Taylor v. Combs*, Ky. (50 S. W. Rep. 64; 20 Ky. Law Rep. 1828). The possession by a bankrupt of lands the legal title to which is vested in his assignee in bankruptcy, is not adverse to such assignee so as to render the sale by him champertous. *Buckler's Adm'r v. Rogers*, Ky. (54 S. W. Rep. 848; 21 Ky. Law Rep. 1265).

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## ALIENS

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### EPITOME OF CASES.

**Sec. 44. Rights of aliens as to real estate—Statutes construed.** Under the common law, an alien could not take an estate by curtesy, though previous to his wife's death he had declared his intention to become a citizen, and subsequently was naturalized. *Quinn v. Ladd*, 37 Or. 261 (59 Pac. Rep. 457). An alien taking a conveyance of land from a citizen of the United States succeeds to the rights of the latter acquired as an original appropriator of water for irrigation. *Lavery v. Arnold*, 36 Or. 84 (57 Pac. Rep. 906). Cal. Civ. Code, § 671, providing that "any person whether citizen or alien,

may take, hold and dispose of property, real or personal, within this state," is not unconstitutional, and under it a nonresident alien may take property by descent. *Blythe v. Hinckley*, 127 Cal. 431 (59 Pac. Rep. 787). Where a nonresident alien is disqualified from acquiring land by descent, one who is compelled to trace his title through such alien cannot take the property by descent. *Meadowcroft v. Winnebago Co.*, 181 Ill. 504 (54 N. E. Rep. 949), construing and applying Laws 1887, p. 5; *Starr & C. Ann. Ill. Stat.*, ch. 39, § 2; *Smith v. Lynch*, 61 Kan. 609 (60 Pac. Rep. 329), construing and applying Kan. Gen. Stat. 1897, ch. 51, § 1; ch. 109, §§ 19, 20.

## ASSIGNMENTS FOR CREDITORS

### EPITOME OF CASES.

**Sec. 45. Formal requisites of deed of assignment—Filing inventory and recording.** Construing and applying Utah Rev. Stat. 1898, § 88, providing that an assignor shall, in a general way, describe the property assigned, with its location, and annex to his deed a verified inventory of his property, it is held that a deed which by its terms embraced all the property of the assignor and in a general way described the property assigned, conveys to the assignee all of such property, except exempt property, and the latter's title is not affected by the absence of or imperfections in the inventory. *Snyder v. Murdock*, 20 Utah 407 (59 Pac. Rep. 88). Citing, *Smith v. Goodman*, 149 Ill. 75 (36 N. E. Rep. 621); *Falk v. Liebes*, 6 Colo. App. 473 (42 Pac. Rep. 46); *Bank v. Kenneally*, 93 N. Y. 374; *Platt v. Lott*, 17 N. Y. 478; *Sabin v. Lebenbaum*, 26 Or. 420 (38 Pac. Rep. 434); *Babbitt v. Mandell*, Ariz. (53 Pac. Rep. 577); *Burrill, Assignm.*, § 100; *McIlhenny Co. v. Miller*, 68 Tex. 357 (4 S. W. Rep. 614); *Loomis v. Griffin*, 78 Ia. 482 (43 N. W. Rep. 296); *Schaller v. Wright*, 70 Ia. 666 (28 N. W. Rep. 460); *Meeker v. Felts*, 49 N. J. Eq. 502 (23 Atl. Rep. 672). N. C. Laws 1893, ch. 453, § 1 construed and applied—filing verified schedule of assets and preferred debts. *Brown & Co. v. Nimocks*, 124 N. C. 417 (32 S. E. Rep. 743); *Hall v. Cottingham*, 124 N. C. 402 (32 S. E. Rep. 745). Ala.

Code, § 1004, construed and applied—recording deed of assignment. *Reeves v. Estes*, 124 Ala. 303 (26 So. Rep. 935). The recording laws apply to a deed of assignment embracing real estate the same as other conveyances. *Eggleston v. Harrison*, 61 O. St. 397 (55 N. E. Rep. 993).

**Sec. 46. Assignments by partners.** One partner of a firm does not have authority, by virtue of the partnership relation alone, to make a general assignment of the property of the firm for the benefit of creditors, if his copartner can easily be, but is not, consulted, and his assent to the proposed assignment obtained. *Mills v. Miller*, 109 Ia. 688 (81 N. W. Rep. 169). Particular assignment by partners held to convey both partnership and individual property. *John Hibben Dry-Goods Co. v. Haley & Sons Assignee*, Ky. (50 S. W. Rep. 252; 20 Ky. Law Rep. 1854).

**Sec. 47. Title and rights of assignee.** An assignee of a mortgagor takes subject to his covenant to pay the ground rent and all taxes on the premises, and the mortgagee is entitled to have the rents received by the assignee applied to the discharge of these obligations. *Barron v. Whiteside*, 89 Md. 448 (43 Atl. Rep. 825). An assignee who purchases property of his assignor at a foreclosure sale thereof and afterward conveys it to persons to whom the latter had before the assignment sold and contracted to convey it, will be held accountable to the creditors for the amount received by him from such persons, and not merely for the amount of his bid. *Mitchell v. Tyler*, Ky. (49 S. W. Rep. 422; 20 Ky. Law Rep. 1249). An assignee for the benefit of creditors may sue to set aside a conveyance executed by his assignor in fraud of his creditors. *Searles v. Little*, 153 Ind. 432 (55 N. E. Rep. 93). But in Illinois it is held that a general assignment for the benefit of creditors does not pass to the assignee any interest in the property previously fraudulently transferred by the assignor, nor any right to impeach or set aside such fraudulent transfer; such right belongs to the creditors alone. *Hinkley v. Reed*, 182 Ill. 440 (55 N. E. Rep. 337). An assignee's sale under Pa. Laws 1876, Act Feb. 17, does not discharge a lien expressly charged against the premises by the deed of prior grantors to secure their support. *Bonebrake v. Summers*, 193 Pa. St. 22 (44 Atl. Rep. 330).

**Sec. 48. Miscellaneous notes.** A conveyance by a grantor of all his property to a trustee for the benefit of creditors is not invalidated by the failure of the grantor to deliver all his property to such trustee. *Hurst v. Leckie*, 97 Va. 550 (34 S. E. Rep. 464; 75 Am. St. Rep. 798). Where a party who is insolvent makes a general assignment of his property, for the benefit of all his creditors, to a trustee, and in said deed of assignment two parcels of real estate are conveyed, upon each of which the assignor owes a balance of purchase money, secured by vendor's lien, which tracts are advertised and sold by the trustee, without mentioning the liens in the notice of sale, to a party who is a large creditor of the assignor, for an adequate price, without reference to the liens, caveat emptor does not apply; and such purchaser, in the circumstances, has the right to discharge such liens out of the purchase money. *Linn v. Collins*, 47 W. Va. 250 (34 S. E. Rep. 916). Where an assignment by a husband of all his property to a trustee for the benefit of creditors, stipulates for the payment of a specified sum to his wife in consideration of her releasing her dower right, the death of the wife after sale by the trustee and before that of her husband, extinguishes the claim secured to her and it vests in the trustee for the benefit of the creditors. *Allen v. Patrick*, 97 Va. 521 (34 S. E. Rep. 451). As to how far the Texas assignment law (Rev. Stat. 1895, §§ 71-86) is supplanted by the national bankruptcy act, see *Patty-Joiner & Eubank Co. v. Cummins*, 93 Tex. 598 (57 S. W. Rep. 566).

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## BONA FIDE PURCHASERS

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### EPITOME OF CASES.

**Sec. 49. As to what constitutes a bona fide purchaser—**  
**General principles and particular cases.** One claiming under a usurious mortgage will not be treated as a bona fide purchaser. *National Mut. Bldg & L. Ass'n v. Culberson*, Ala. (25 So. Rep. 173). A purchaser who has notice, actual or constructive, of the rights of third persons in the land at any moment of time before the payment of the purchase money



is not a bona fide purchaser, and the burden is upon him to show that he had not such notice. *Beattie v. Crewdson*, 124 Cal. 577 (57 Pac. Rep. 463). The holder of a judgment obtained on a debt of long standing who surrenders it in consideration of a conveyance of land to him by the judgment debtor is not a bona fide purchaser, as against a prior unrecorded assignment of the land to a third party, of which he had no notice. *Howells v. Hetrick*, 160 N. Y. 308 (54 N. E. Rep. 677). A purchaser from a coparcener of the share of the land allotted to him in partition proceedings takes subject to the right of others to set aside such proceedings. *Lockhart v. Vandyke*, 97 Va. 356 (33 S. E. Rep. 613). A tenant in common taking the portion of the estate assigned to her in severalty by a decree in partition will be treated as a bona fide purchaser of such portion, as against one claiming under an unrecorded assignment of a mortgage of which he had no notice. *Citizens' State Bank v. Julian*, 153 Ind. 655 (55 N. E. Rep. 1007).

In Georgia, where the doctrine of the vendor's equitable lien for purchase money does not prevail, it is held that a vendee of land for a valuable consideration does not take it subject to a judgment which may be afterwards obtained on outstanding purchase money notes given by his vendor to the party from whom he purchased the land, although the deed made to the second vendee contains an agreement on his part to pay such indebtedness. *Rounsaville v. Peek*, 108 Ga. 584 (34 S. E. Rep. 141). In Tennessee, where the probate of a will in common form is conclusive, until annulled, both as to the capacity of the testator, and as to the testamentary character of the instrument and its due execution, and where there is no time limit in which to contest the will, it is held that one purchasing property in good faith and for full value from the sole devisee of a duly probated will, is entitled to protection upon the subsequent setting aside of the probate of the will by minor heirs of the testator. *Reaves v. Hager*, 101 Tenn. 712 (50 S. W. Rep. 760). Ga. Civ. Code, § 5355, construed and applied—as to when a purchaser from an execution defendant will be regarded as a bona fide purchaser. *Rodgers v. Elder*, 108 Ga. 22 (33 S. E. Rep. 662). Wash. Laws 1891, p. 368, for the protection of bona fide purchaser of real estate applies only to purchasers of community property. *Sengfelder v. Hill*, 21 Wash. 271 (58 Pac. Rep. 250).

**Sec. 50. Purchasers at execution or judicial sales.**

Neither a judgment creditor nor an execution creditor purchasing real estate at his own sale is a bona fide purchaser, within the meaning of the recording act of Washington. *Dawson v. McCarty*, 21 Wash. 314 (57 Pac. Rep. 816; 75 Am. St. Rep. 841); *Hacker v. White*, 22 Wash. 415 (60 Pac. Rep. 1114; 79 Am. St. Rep. 945, and exhaustive note on "Title acquired by purchaser at his own execution sale"). Where one of two administrators purchases lands of the estate at a probate sale thereof and fails to pay the purchase price according to the terms of the order of the court, a subsequent purchaser from him cannot claim as a bona fide purchaser, although he bought in ignorance of the fact that the purchase money had not been paid, and although the conveyance to such administrator was made under an order of court prior to his sale to the subsequent purchaser. *Langley v. Langley*, 121 Ala. 70 (25 So. Rep. 707).

**Sec. 51. Grantee in quitclaim deed.** In Missouri a grantee for value, and without notice, in a quitclaim deed, acquires the same rights against an unrecorded deed of which he has no actual notice as any other innocent purchaser, *Elliott v. Buffington*, 149 Mo. 663 (51 S. W. Rep. 408); but in Michigan it is held that a grantee in a quitclaim deed, although a purchaser for value and without notice, cannot claim as a bona fide purchaser. *Beakley v. Robert*, 120 Mich. 209 (79 N. W. Rep. 193). The court say: "Authorities are numerous that one who takes by deed of quitclaim is not a bona fide purchaser. Thus, it is said in *May v. Le Claire*, 11 Wall. 217, that 'one who has acquired his title by a quitclaim deed cannot be regarded as a bona fide purchaser without notice;' in *Oliver v. Piatt*, 3 How. 333, 'A purchaser by a deed of quitclaim, without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration, without notice, and he takes only what the vendor could lawfully convey;' in *Dickerson v. Colgrove*, 100 U. S. 578, 'A grantee by deed of quitclaim is not a bona fide holder;' and in *Baker v. Humphrey*, 101 U. S. 494, 'No one taking a quitclaim deed can stand in the relation of a bona fide purchaser.' In the case of *Deveaux v. Fosbender*, 57 Mich. 588 (24 N. W. Rep. 790), the late Mr. Justice Campbell expressed a doubt of the bona fide character of such a holding, while the case of *Peters v.*

Cartier, 80 Mich. 129 (45 N. W. Rep. 73; 20 Am. St. Rep. 508), expressly holds such grantee not to be a bona fide purchaser in a case substantially like the present. See, also, *Johnson v. Williams*, 37 Kan. 181 (14 Pac. Rep. 537; 1 Am. St. Rep. 243), where many authorities are cited." A grantee in a quitclaim deed is not a bona fide purchaser with respect to outstanding and adverse equities and interests shown by the records, or which are discoverable by the exercise of reasonable diligence in making proper examinations and inquiries. *Pope v. Nichols*, 61 Kan. 230 (59 Pac. Rep. 257).

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## BOUNDARIES.

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### EPITOME OF CASES.

**Sec. 52. Agreements fixing.** A survey made under a contract between adjoining owners, in which they agree "to abide by the line as established by the surveyor and according to our deeds," does not bind them as to any land not described in the deeds, and only in so far as the line is run according to the deeds. *McCombs v. Wall*, 66 Ark. 336 (50 S. W. Rep. 876). Where there is a dispute between adjoining owners of land as to the true boundary line, or that line is unascertained, they may establish it by a parol agreement and possession in pursuance thereof, and the line so agreed upon will be binding upon them and their privies in estate; and such an agreement may be implied from the unequivocal acts and declarations of the parties and acquiescence for a considerable length of time. *Clayton v. Feig*, 179 Ill. 534 (54 N. E. Rep. 149); *Schwartz v. Gebhardt*, 157 Mo. 99 (57 S. W. Rep. 782). To the same effect is the case of *Brummell v. Harris*, 148 Mo. 430 (50 S. W. Rep. 93), collating numerous Missouri cases on this subject. In discussing this subject, the supreme court of Missouri, in the case of *McKinney v. Doane*, 155 Mo. 287 (56 S. W. Rep. 304), say: "That adjoining landed proprietors may agree upon and establish a line between them as the dividing line, regardless of the fact that they may not know where the true line is, according to a plat of the ground theretofore made, if they so

desire, may be conceded; but where they are mistaken as to the location of the true line, and do not, regardless of that fact, agree upon another, then the possession or agreement by them with reference to a division line, where they are mistaken as to the location of the true line, does not operate as an estoppel against either."

**Sec. 53. Establishing boundaries by adverse possession.** Where adjoining owners and their predecessors in title occupy land to a given definitely marked line and treat such line as the true boundary between their respective lands for the prescriptive period, neither thereafter can claim beyond such line. *Larsen v. Onesite*, 21 Utah 38 (59 Pac. Rep. 234); *Brummell v. Harris*, 148 Mo. 430 (50 S. W. Rep. 93); *Miller v. Mills Co.*, 111 Ia. 654 (82 N. W. Rep. 1038), collating and citing numerous authorities. Where one of two adjoining owners takes and holds possession up to a fence which he supposes is on the true line, claiming to the fence, his possession is adverse as to all land within his enclosure, *Hedges v. Pollard*, 149 Mo. 216 (50 S. W. Rep. 889); although it was not his intention to claim more than his own. *Flynn v. Wacker*, 151 Mo. 545 (52 S. W. Rep. 342). But the possession by one of his neighbor's land under a mistaken idea as to the true location of the boundary between them and without any intention to assert title, or under the belief that he was occupying to the true boundary subject to correction as the fact might afterward develop, no matter how long continued, is not adverse and does not give him title beyond his true line. *Miller v. Mills Co.*, 111 Ia. 654 (82 N. W. Rep. 1038); *Brummell v. Harris*, 148 Mo. 430 (50 S. W. Rep. 93); *McCabe v. Bruere*, 153 Mo. 1 (54 S. W. Rep. 450). In Wisconsin it is held that notorious, uninterrupted and unexplained possession of land up to a fence for the prescriptive period will be presumed to be adverse to all the world, not excepting the adjoining owner, *Wollman v. Ruehle*, 104 Wis. 603 (80 N. W. Rep. 919); but upon this subject the supreme court of Louisiana, in the case of *Williams v. Bernstein*, 51 La. Ann. 115 (25 So. Rep. 411), say: "The mere fact that parties owning adjoining property have cultivated lands up to a certain line, or up to a certain fence, built either by one or both, or built by one and repaired by the other, does not per se evidence an adverse possession up to the line or fence, or an acquiescence in or recognition of

an adverse ownership. Neighbors constantly run up fences within or beyond the boundary lines, and join their fences; doing so with the knowledge and understanding that such acts are merely temporary, and done subsidiarily to, and with reference to, the right of both ultimately to ascertain and fix rights by an action of boundary, or through a formal, legal survey. Until this happens, the lands held by each are in the occupancy, and not in the adverse possession, of either,—certainly so in the absence of a clear and direct claim advanced of adverse ownership and possession."

**Sec. 54. Proceedings to establish boundaries—Statutes construed.** Minn. Gen. Stat. 1894, §§ 5823-5829, providing for the fixing and establishing of boundary lines of lands by civil actions, is constitutional. *Benz v. City of St. Paul*, 77 Minn. 375 (79 N. W. Rep. 1024). This statute was not designed merely to establish the location of the original government or other line between the parties, but to establish the present boundary line between them according to their respective existing rights of property; and hence the court is required to try and determine adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines involved. *Stadin v. Helin*, 76 Minn. 496 (79 N. W. Rep. 537). As to evidence admissible in proceedings under the statute, see *Ferch v. Konne*, 78 Minn. 515 (81 N. W. Rep. 524). N. C. Laws 1893, ch. 22, construed and applied—proceedings to locate boundary—particular instructions held proper. *Williams v. Hughes*, 124 N. C. 3 (32 S. E. Rep. 325). Under La. Rev. Civ. Code, art. 825, it is held that an action of boundary, pure and simple, is not open to a plea of prescription. *Williams v. Bernstein*, 51 La. Ann. 115 (25 So. Rep. 411). For cases determining particular questions as to the admissibility of evidence in settling a disputed boundary, see *Olin v. Henderson*, 120 Mich. 149 (79 N. W. Rep. 178); *Burdin v. Inglis*, 121 Mich. 410 (80 N. W. Rep. 115); *Shaver v. Adams*, 37 Or. 282 (60 Pac. Rep. 902).

**Sec. 55. Locating lost corners.** Where a government corner is lost or obliterated, so that resort must be had to the government field notes for the purpose of determining its location, but these field notes are inconsistent, and cannot be recon-

ciled, there is no universal rule that certain ones shall be preferred to the others, but, as in a case where living witnesses contradict each other, those should be accepted as correct which, under all the circumstances, are most entitled to credit, and most likely to be in accordance with the actual facts. A witness or bearing tree is not an established corner, but merely a designated object from which, in connection with the field notes, the location of the corner may be ascertained. *Stadin v. Helin*, 76 Minn. 496 (79 N. W. Rep. 537).

**Sec. 56. Highways as boundaries.** Where land is bounded "on the west line" of a highway which was built nearly four rods outside of the recorded location, the true boundary line of such land is the exterior limit of the road as it was worked and actually used for travel, and not the "west line" of an invisible and unworked location. *Brooks v. Morrill*, 92 Me. 172 (42 Atl. Rep. 357). The court say: "It is undoubtedly the well-settled rule of construction in this state that if the land described in a deed is bounded on a highway, or its boundary line runs to a highway, and thence by the highway, the grantee is presumed to take a fee to the center of the highway, subject to the public easement, if the grantor owns to the center; but this presumption may be rebutted and controlled when the terms of the description and the circumstances of the conveyance clearly indicate a contrary intention. *Low v. Tibbetts*, 72 Me. 92 (39 Am. Rep. 303); *Oxton v. Groves*, 68 Me. 372 (28 Am. Rep. 75). And, ordinarily, if a boundary runs to or by the line of an object, the exterior limit of the object is intended. 'So, in common language, if one speaks of the line or lines of a street, the exterior limits would be understood and intended.' *Hamlin v. Manufacturing Co.*, 141 Mass. 51 (6 N. E. Rep. 531); *Smith v. Slocomb*, 9 Gray, 36 (69 Am. Dec. 274)."

**Sec. 57. Streams and waters as boundaries.** The boundary of a town which is the center of a nonnavigable fresh water stream is not changed by a diversion of the channel of the stream by artificial means by a mill owner. *In re Town Boundaries*, 21 R. I. 581 (42 Atl. Rep. 870). The boundary between the state of Illinois and the state of Missouri is the center thread of the Mississippi river, regardless of gradual changes. *Bellefontaine Imp. Co. v. Neidringhaus*, 181 Ill.

426 (55 N. E. Rep. 184; 72 Am. St. Rep. 269). The shore of a lake becomes the real boundary of the abutting fractional subdivisions or lots, as they are termed, and not the meander line as surveyed, if there is found to be a discrepancy between the two. *French-Glenn Live Stock Co. v. Springer*, 35 Or. 312 (58 Pac. Rep. 102). The lot was held to extend to and be bounded by the river, where, according to the government survey, the meander line of a fractional government lot purported to coincide with the bank of the river, but in fact it did not do so, and there was a strip of land between the meander line and the river. *Olson v. Thorndike*, 76 Minn. 399 (79 N. W. Rep. 399). Under Va. Code, § 1339, the rights and privileges of owners of land lying on bays, rivers, creeks and shores extend to the low water mark, although the boundaries designated in the conveyances are to "high water mark," unless the terms of the deeds manifest a clear intention to control the operation of the statute. *Waverly Water-Front & Imp. Co. v. White*, 97 Va. 176 (33 S. E. Rep. 534; 45 L. R. A. 227; see pp. 227-242 for exhaustive note on "Title to land between high and low water mark"). For note collating authorities on "Boundary on artificial body of water," see 51 L. R. A. 178-180.

**Sec. 58. Monuments, courses and distances.** Ordinarily if a boundary runs to or by the line of an object, the exterior limit of the object is intended. *Brooks v. Morrill*, 92 Me. 172 (42 Atl. Rep. 357). Where a conveyance of additional land by a grantor to his grantee describes the boundary line of the premises conveyed as "commencing twelve and one-half feet east of [the grantee's] house," the distance should be measured from the foundation of the house. *Kendall v. Green*, 67 N. H. 557 (42 Atl. Rep. 178). Where a deed reserving "all that portion within the coal measures" situated in a certain corner of the land conveyed, known as "Oakley Coal Bed," describes the reserved lands as being bounded on two sides by designated lots and on the remaining sides by the outcrop of "the conglomerate rock," it is held that the latter expression generally understood to be the outside of "the coal measures" will control recitals of quantity contained in the description. *Miller v. Cramer*, 190 Pa. St. 315 (42 Atl. Rep. 690).

A call for monuments will control courses and distances. *Johnson v. Bowlware*, 149 Mo. 451 (51 S. W. Rep.

109). In a conveyance of land by natural monuments, distances and quantity, being the most uncertain, must yield to the description by natural monuments; and, in an action to quiet title to land so described, it is proper for a court to read into the deed sufficient language to close the description by natural monuments. *Park v. Wilkinson*, 21 Utah, 279 (60 Pac. Rep. 945). A call for the meanders or banks of a stream controls courses and distances. *Hunter v. Witt*,

Ky. (50 S. W. Rep. 985; 21 Ky. Law Rep. 35); *Turnage v. Kenton*, 102 Tenn. 328 (52 S. W. Rep. 174). A call for course or distance must yield to that for an established line. *Phillips v. Crabtree*, Tenn. (52 S. W. Rep. 787); *Miller v. Holt*, 47 W. Va. 7 (34 S. E. Rep. 956); *Kant v. Rice*, Ky. (55 S. W. Rep. 203; 21 Ky. Law Rep. 1365). Definite monuments referred to in a deed control the location of the land conveyed. *Bartlett v. La Rochelle*, 68 N. H. 211 (44 Atl. Rep. 302). Where there is a conflict between designated monuments and stated measurements of lines, it is error to instruct the jury that if they cannot locate all the land shown by the record to have been conveyed by construing the instrument with reference to the designated monuments, they are at liberty to disregard the monuments and locate the land by distances. *Pringle v. Rogers*, 193 Pa. St. 94 (44 Atl. Rep. 275). The stakes of the original survey are more satisfactory evidence of the boundaries of city lots than a location based upon marks and field notes of another survey not shown to be correct. *Kuglin v. Bock*, 181 Ill. 165 (54 N. E. Rep. 907).

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## CEMETERIES

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### EPITOME OF CASES.

**Sec. 59. Recovery of damages for trespass on cemetery lot or injury to monuments thereon.** One who is the owner of the easement of burial in a cemetery lot, or who is rightfully in possession of the same, is entitled to recover damages from any one who wrongfully enters upon such lot and disinters the remains of persons buried thereon. Ja-



cobus v. Congregation of Children of Israel, 107 Ga. 518 (33 S. E. Rep. 853; 73 Am. St. Rep. 141), citing the case of Bessemer Land & Imp. Co. v. Jenkins, 111 Ala. 135 (epitomized at length in Ballards' Law of Real Property, Vol. V, § 57). If a gravestone or monument which has been erected upon a cemetery lot, is defaced or removed during the lifetime of the person who erected it, he may, at common law, recover damages from the one who inflicted the injury; but, if the injury is inflicted after his death, the heirs at law of the person to whose memory the gravestone or monument was erected are entitled to maintain the action. Jacobus v. Congregation of Children of Israel, 107 Ga. 518 (33 S. E. Rep. 853; 73 Am. St. Rep. 141). Citing Day v. Beddingfield, Noy, 104; Spooner v. Brewster, 3 Bing. 136; Sabin v. Harkness, 4 N. H. 415 (17 Am. Dec. 437); In re Brick Presbyterian Church, 3 Edw. Ch. 155; Mitchell v. Thorne, 134 N. Y. 536 (32 N. E. Rep. 10; 30 Am. St. Rep. 699); Pierce v. Proprietors, 10 R. I. 227 (14 Am. Rep. 667).

**Sec. 60. Municipal control.** Cal. Const., art. II, § 11, providing that "any county, city, town, or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws," does not authorize an ordinance by a board of supervisors of a county declaring that "it shall be unlawful to locate or establish, extend or enlarge, any cemetery, graveyard, burying ground or crematory, within the limits of the county \* \* \* without the permission of the board of supervisors first had and obtained." Los Angeles Co. v. Hollywood Cemetery Ass'n, 124 Cal. 344 (57 Pac. Rep. 153; 71 Am. St. Rep. 75). The court say: "Is the ordinance before us a reasonable exercise of the power conferred by the constitution and the statutes upon boards of supervisors and as applicable to counties? It cannot be assumed that the supervisors in the present case legislated with a view to reach the defendant's enterprise especially, or that they knew it was in contemplation when the ordinance was enacted. On the contrary, it must be presumed that their purpose was to promote the welfare of the inhabitants. The validity of the ordinance must be determined from its face alone. The ordinance makes it unlawful to establish, extend, or enlarge any cemetery within the limits of the

county without the permission of the supervisors. It does not attempt to deal with or prohibit private interments, nor with interments in cemeteries already established. It declares that in no part of Los Angeles county, however remote from any city or town, even though the location be suitable for the purpose and entirely satisfactory to the neighboring inhabitants, no cemetery shall be established except by permission of the supervisors first obtained. As the ordinance is silent as to interments in cemeteries already established, it necessarily permits burials in such cemeteries without restriction, and thus allows the owners of cemeteries already established the right to exercise privileges denied to defendant. It is not unlawful to establish cemetery for the burial of the dead, deriving profit therefrom as a business enterprise. To provide for the repose of the dead is as lawful as to provide for the comfort of the living. There are reasons why the burial of the dead should be subject to reasonable regulation which may not justify similar restrictions or regulations as to the homes of the living, but we can see no more reason why the right to establish cemeteries in a county should be subject to the will of the supervisors than that the right to engage in any other lawful enterprise should be so circumscribed. There is a wide difference between regulation and prohibition,—between regulatory provisions as a condition imposed for the exercise of a lawful occupation, and making the right itself to depend upon the unrestrained will of the municipality. It would hardly be contended that an ordinance declaring it to be unlawful to engage in the business of farming or merchandising in the county without the permission of the supervisors would be a reasonable exercise of legislative power, or could reasonably be said to be exercising the power to regulate. The supervisors may impose a license, the payment of which shall be a condition to the enjoyment of the privilege of engaging in lawful occupations; they may regulate the manner of conducting the business, if it be of a character tending to be injurious; but if the business be lawful, and having no injurious tendency, they cannot say who shall and who shall not exercise the right itself. Under the guise of regulating a business the municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in

that business. We do not think it was ever intended by the people, in ordaining the section of the constitution referred to, or of the legislature in the statutory enactment, to include, in the power to make and enforce regulations, a power purely personal and arbitrary; 'for,' as was said by Matthews, J., in *Yick Wo v. Hopkins*, 118 U. S. 356 (6 Sup. Ct. Rep. 1064), 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery.' In *Austin v. Murray*, 16 Pick 121, the ordinance prohibited any person from bringing into the town of Charleston any dead body, or cause the same to be conveyed through the streets, or to be buried on the premises of such person, without a permit from the selectmen of the town. The court said that if the by-law had been limited to the populous part of town, and had been made in good faith, 'for the purpose of preserving the health of the inhabitants, which may be in some degree exposed to danger by the allowance of interment in the midst of dense population, it would have been a very reasonable regulation. But it cannot be pretended that this by-law was made for the preservation of the health of the inhabitants. Its restraints extend many miles into the country, to the utmost limits of the town. Such an unnecessary restraint upon the right of interring the dead we think essentially unreasonable.' In *State v. Mott*, 61 Md. 297 (48 Am. Rep. 105), the city council of Baltimore was granted power to pass ordinances to preserve the health of the city, to prevent and remove nuisances, prevent the introduction of contagious diseases within the city, and within three miles thereof regulate the places for manufacturing soap and candles, the erection of slaughter houses and distilleries, 'and wherever every other offensive trade is carried on.' The city passed an ordinance making it unlawful for 'any person \* \* \* to work, operate, or continue in use, for the purpose of burning oyster shells or limestone, any kiln situated or erected within the limits of the city of Baltimore.' The ordinance was held to be void, because an absolute prohibition of a lawful occupation, which might, on the remote outskirts of the city, be carried on without injury to anyone."

# CHARITABLE USES

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## EPITOME OF CASES.

**Sec. 61. Conveyances for—Who may take.** In the absence of a statute fixing the limit to which a charitable corporation can take and hold real estate, and forbidding it to take and hold beyond such limit, the heirs of a deviser cannot question its right to take a devise collaterally in a suit to construe his will. *Cheatham v. Nashville Trust Co.*, Tenn. (57 S. W. Rep. 202). An established charitable organization may take a devise for a charitable purpose although it is unincorporated. *Chambers v. Higgins' Ex'r*, Ky. (49 S. W. Rep. 436; 20 Ky. Law Rep. 1425). A statute (Ill. Laws 1841, p. 259, § 6) empowering town school trustees "to receive, by deed or otherwise, and hold for the use of any school or schools in the township, any real estate, personal property or money which may be conveyed or delivered to them for the uses aforesaid," does not necessarily give them title to a charitable devise of lands devised to a particular town, the income from which is "to be applied by the trustees and directors of the public school" in such town. *Trustees of Schools v. Petefish*, 181 Ill. 255 (54 N. E. Rep. 920).

**Sec. 62. Conveyances for—Validity—Definiteness required.** For a history of the law of charitable uses and an exhaustive discussion of the principles upon which it rests in the United States, see *Harrington v. Pier*, 105 Wis. 485 (82 N. W. Rep. 345; 50 L. R. A. 307; 76 Am. St. Rep. 924); *Lackland v. Walker*, 151 Mo. 210 (52 S. W. Rep. 414); *Spalding v. St. Joseph's Industrial School*, Ky. (54 S. W. Rep. 200; 21 Ky. Law Rep. 1107). For a discussion of the decisions of the state of New York as to the validity of charitable devises, and a discussion of Laws 1893, ch. 701, being "an act to regulate gifts for charitable purposes," see *Allen v. Stevens*, 161 N. Y. 122 (55 N. E. Rep. 568). A bequest to a Woman's Christian Temperance Union is a

valid charity, *Sherman v. Congregational Home Mis. Soc.*, 176 Mass. 349 (57 N. E. Rep. 702); and so is a bequest to trustees to be by them or the survivor of them expended for temperance work in the city of Milwaukee, *Harrington v. Pier*, 105 Wis. 485 (82 N. W. Rep. 345; 50 L. R. A. 307; 76 Am. St. Rep. 924). See opinion for exhaustive discussion of the subject of charitable uses. A bequest to the trustees of a designated orphans' home "in trust for the use and benefit of the orphan children of said institution," is a valid charity. *In re Upham's Estate*, 127 Cal. 90 (59 Pac. Rep. 315). A devise of lands in trust to keep a burial lot and monument always in order is valid, and, under Mass. Stat. 1884, ch. 186, such a devise may be made to a city or town. *Morse v. Inhabitants of Natick*, 176 Mass. 510 (57 N. E. Rep. 996). For particular charitable bequests held valid, see *Kieth v. Scales*, 124 N. C. 497 (32 S. E. Rep. 809); *Lackland v. Walker*, 151 Mo. 210 (52 S. W. Rep. 414); *Crawford's Heirs v. Thomas*, Ky. (54 S. W. Rep. 197; 21 Ky. Law Rep. 1100); *Cheatham v. Nashville Trust Co.*, Tenn. (57 S. W. Rep. 202). A devise of a testator's entire estate to his executor "for charitable objects, to be expended for said objects in this diocese of Louisville, according to his discretion," is void for uncertainty. *Spalding v. St. Joseph's Industrial School*, Ky. (54 S. W. Rep. 200; 21 Ky. Law Rep. 1107). The same is held in Louisiana as to a similar bequest. *Succession of Burke*, 51 La. Ann. 538 (25 So. Rep. 387). The general charitable intent being clear, the court will carry into effect a charitable bequest, although there may be uncertainty in regard to the particular persons or objects intended to be benefitted by the testator's bounty. *Sherman v. Congregational Home Mis. Soc.*, 176 Mass. 349 (57 N. E. Rep. 702). A bequest to a town "for the poor widows, and children under 10 years of age, to buy them meal, flour and fish," is a valid charity, and a trustee should be appointed in the place of the town. *Towle v. Nesmith*, 69 N. H. 212 (42 Atl. Rep. 900). A devise of a testator's entire property "to be invested in a fund provided for the purpose for the support and maintenance of the superannuated preachers of the church denominated the United Brethren in Christ," creates a valid charity. *Hood v. Dorer*, 107 Wis. 149 (82 N. W. Rep. 546).

**Sec. 63. Church property—Control, conveyance and incumbrance—Liability for debts.** Contributions made by persons not members of the church to a fund to be used by it in the purchase of real estate do not make them, in a legal sense, donors of the land itself to the church or give them the right, as donors of land for charitable uses, to impose restrictions upon the right of alienation given by the statute incorporating the church. *Holmes v. Trustees of Wesley M. E. Church*, 58 N. J. Eq. 327 (42 Atl. Rep. 582). Where the members of several religious denominations unite in the construction and repair of a church building, the fact that one denomination contributing the most, by agreement of all, is given the preference as to the use of the building, does not authorize it to exclude the other denominations from the use thereof. *Williams v. Concord Cong. Church*, 193, Pa. St. 120 (44 Atl. Rep. 272). A conveyance of property in trust for the benefit of the members of a certain Methodist Episcopal church, according to the rules and discipline which from time to time may be agreed upon and adopted by the ministers and preachers of such church at their general conference in the United States, authorizes a majority of the church members, acting in accordance with the discipline of the church, to sell the property and devote the proceeds toward building a larger church on a different site. *Fair v. First M. E. Church of Bloomington*, 57 N. J. Eq. 496 (42 Atl. Rep. 166). One attacking a deed of property belonging to a church executed by its trustees and which recites that it was executed by the authority and direction of the church members, has the burden of proving the want of such authority. *McCallister v. Ross*, 155 Mo. 87 (55 S. W. Rep. 1027). N. H. Pub. Stat., ch. 153, § 8 construed and applied—sale of church property. *First Presbyterian Society of Antrim v. Bass*, 68 N. H. 333 (44 Atl. Rep. 485). Lands, the title to which is held by the bishop of a Protestant Episcopal Church, in trust for the wardens, vestry and congregation of an unincorporated parish, cannot be mortgaged by the vestrymen without his knowledge or consent. *Hill Estate v. Whittlesey*, 21 Wash. 142 (57 Pac. Rep. 345). For particular fact case determining the authority of a church to execute notes and a mortgage to secure them and its liability thereon, see *Miller v. Childs*, 120 Mich. 639 (79 N. W. Rep. 924). A voluntary

association of persons, organized for religious purposes, which has regularly appointed trustees to hold and manage its property is liable to have such property subjected to the payment of money furnished for the use of such trust estate under proceedings authorized by statute. To such proceedings, where the trustees reside in the county where suit is brought, they are the only necessary parties defendant. *Josey v. Union Loan & Trust Co.*, 106 Ga. 608 (32 S. E. Rep. 628).

**Sec. 64. Church property—Change of creed and schisms—Power of court to sell and divide property.** A revision of the constitution and confession of faith of a church which does not destroy its identity and which has not been declared invalid by the proper ecclesiastical authorities, will be enforced by the courts, and the property of the church left in the custody of those acting in accordance therewith. *Horsman v. Allen*, 129 Cal. 131 (61 Pac. Rep. 796). Where land is donated to a church organized under articles of faith, and having no ecclesiastical superior, and the church building erected thereon was paid for by subscriptions from members and others, and there is no trust imposed on the property, either by the donation or subscriptions, that it should be used for the propagation and support of such articles of faith, the courts will not imply such a trust for the purpose of expelling from its use those who, by regular succession and order, constitute the church, though they have changed in some respects their articles of faith. *First Baptist Church of Paris v. Fort*, 93 Tex. 215 (54 S. W. Rep. 892; 49 L. R. A. 617).

In case of the division of a church congregation, title to its property is in that portion, although in the minority, which is in harmony with its laws, usages and customs, as established by the recognized authority before the division. *Bose v. Christ*, 193 Pa. St. 13 (44 Atl. Rep. 240). Where the members of an independent incorporated church organization are nearly equally divided by irreconcilable differences in matters of faith and doctrine regarded vitally essential by each, and neither faction has forfeited any rights to the property under the constitution of the church, it is not error for a court of equity to decree a sale of the church property, and a division of the proceeds arising

therefrom among the members; and where, in such a case, the church stands on real estate deeded with a clause in the conveyance that it was to be used for church purposes, and other buildings thereon have been built with money contributed with like intention on the part of the donors, it is held that at the sale under the decree the privilege of purchasing first should be given to the two factions and that the one paying the higher price should be entitled to exclusive ownership. If neither sees fit to purchase, the sale should then be opened to all bidders. *Immanuels Gemeinde v. Keil*, 61 Kan. 65 (58 Pac. Rep. 973). The court say: "The plaintiffs in error insist that the incorporation of the church is an insuperable obstacle in the way of the division of its property among the members. We cannot agree with them in this contention. In *Winebrenner v. Colder*, 43 Pa. St. 249-252, it is said: 'The legislature never means by granting or allowing such charters, to change the ecclesiastical status of the congregation, but only to afford them a more advantageous civil status.' See, also, *Wheelock v. First Presbyterian Church*, 119 Cal. 477 (51 Pac. Rep. 841). In *Brunnemeyer v. Buhre*, 32 Ill. 184-190, we find the following: 'By the election which organized the corporation, the title became vested in the trustees and their successors for the use of the trust, as completely as if the use had been declared by deed. \* \* \* A trust of this character is not distinguishable in this from any other trust over which courts of chancery exercise a supervisory power.' In the case of *Ferraria v. Vasconcellos*, 31 Ill. 25-56, which was a case quite similar to the one at bar, Chief Justice Caton uses this language: 'In a case thus peculiar in its facts, differing as it does from all others which we find reported, where neither party has incurred a forfeiture, we are to apply the rules of equity and a sound morality. This can only be done by a division of the property, where the members of the church have thus become divided in numbers nearly equal. We could not be understood that such a division should be made where one party or the other consisted of a single member, or but a very few members, for then the minority might be considered as acting obstinately or perversely; but where, as in this case, the numbers are nearly equal, there is propriety in recognizing



the rights of each.' See, also, *Niccolls v. Rugg*, 47 Ill. 47 (95 Am. Dec. 462).

"The court below adjudged the sale of the real estate and all the personal property to be sold as upon execution; the proceeds to be first applied to the payment of costs, and the residue to be divided equally between the plaintiff and defendant factions of said congregation. In order that the property may not be diverted from the religious purposes for which it has been dedicated, but be preserved for church purposes, as expressed in one of the deeds, we think the privilege of purchasing should be reserved to the two factions in the church, and that whichever, upon the sale, offers to pay the higher price, should be entitled to exclusive ownership. This was done in the case of *Niccolls v. Rugg*, 47 Ill. 47 (95 Am. Dec. 462), and was considered a proper and equitable method of disposing of the property. If neither sees fit to purchase, then the sale should be opened to all bidders." For case determining particular controversy as to the right to church property, see *St. Paul's Reformed Church v. Hower*, 191 Pa. St. 306 (43 Atl. Rep. 221).

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## COMMUNITY PROPERTY.

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[In Vol. III, §§ 70-87; Vol. IV, §§ 68-71; Vol. V, §§ 65-69; Vol. VI, §§ 109-116; Vol. VII, §§ 60-64, will be found a compilation of the statutes and decisions of the several states and territories on the subject of Community Real Estate. Below we give such amendments, changes and additional constructions as have been made.]

### Sec. 65. Arizona.

(See Vol. III, § 79; Vol. VI, § 109.) The presumption created by Rev. Stat., § 2102, that "all property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived or may live separate and apart from her husband, shall be deemed the common property of the husband and wife," does not exist

after a conveyance of community property from a husband to his wife, but she thereafter holds it as her separate estate. *Main v. Main*, Ariz. (60 Pac. Rep. 888).

#### Sec. 66. California.

(See Vol. III, § 80; Vol. IV, § 68; Vol. V, § 65; Vol. VI, § 110; Vol. VII, § 60.) Civ. Code, § 164, is amended so as to read: "All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed, or transferred to, or otherwise placed in the name of a married woman by an instrument in writing the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her as a tenant in common, unless a different intention is expressed in the instrument; and the presumptions mentioned in this section are conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration. And in cases where a married woman or a widow has conveyed, or shall hereafter convey, real property her husband or his heirs or assigns are barred from commencing or maintaining any action to show that said real property was community property or to recover the same as follows: As to conveyance made prior to March fourth, 1897, one year after such making; and as to conveyances made after such date, one year from the filing for record in the recorder's office of such conveyances respectively." Statutes and Amendments to the Codes 1901, p. 338, § 34. Civ. Code, § 146—disposition of community property on divorce—amended, Id. p. 338, § 32. Under Civ. Code, §§ 158, 159, authorizing husband and wife, by contract with each other, to "alter their legal relations as to property," they may, by agreement properly executed, convert their separate estates into community property. *Yoakam v. Kingery*, 126 Cal. 30 (58 Pac. Rep. 324). Laws 1897, p. 63, amending Civ. Code, § 164, extending period of limitations on actions by husband to recover community property previously conveyed by wife, does not apply to causes of action already barred. *Peiser v. Griffin*, 125 Cal. 9 (57 Pac. Rep. 690).

#### Sec. 67. Idaho.

(See Vol. III, § 81; Vol. VI, § 111.) Property purchased in the name of the wife, partly with funds of her separate estate, and partly with money borrowed during the existence of the community, is the separate estate of the wife, to the extent to which funds of her separate estate are used, and community property to the extent to which such borrowed money is used, in its purchase. As a rule, property purchased with money borrowed by either spouse during the existence of the community is community property. The husband may incur by mortgage, without the wife joining him, an undivided interest in

lands not a homestead, nor used as a residence, which belong to the community, although the wife may have a separate estate in said lands. *Northwestern & P. Hypotheek Bank v. Rauch*, Ida. (61 Pac. Rep. 516). Under Rev. Stat., § 2505, the husband has the management and control of the community property with like absolute power of disposition (other than testamentary) as he has of his separate property, but such power of disposition does not extend to the homestead, or to that part of the common property occupied or used by the husband and wife as a residence. The wife's signature is not necessary to an instrument by which the husband conveys or incumbers that part of the community property of which he has absolute power of disposition. *Wilson v. Wilson*, Ida. (57 Pac. Rep. 708). A mortgage given by a husband on government lands upon which he has made a pre-emption settlement to a third person to secure a loan of money with which to pay the government price, has priority over any interest of the wife in the land. *Kneen v. Halin*, Ida. (59 Pac. Rep. 14).

#### Sec. 68. Louisiana.

(See Vol. III, § 82; Vol. IV, § 69; Vol. V, § 66; Vol. VI, § 112; Vol. VII, § 61.) A homestead claim, filed during the existence of the community, to land in the possession of and cultivated by the community during five years (proper application had been filed and final proof made), is property of the community, although the final receipt was issued after the dissolution of the community by the death of the wife. *Brown v. Fry*, 52 La. Ann. 58 (26 So. Rep. 748). The fruits and revenues of the wife's separate property, administered by the husband, fall into the community. Where the husband, for the community, cultivates a plantation, the separate property of the wife, the indebtedness incurred in such cultivation is a liability of the community, and the wife cannot be individually held for the same; and this includes the ordinary repair account of the plantation, by which the same is kept in a fair state of preservation, and deterioration prevented. *Courrege v. Colgan*, 51 La. Ann. 1069 (25 So. Rep. 942). Notwithstanding the surviving widow in community has a legal usufruct upon the undivided share of the heirs in the property of the succession of the deceased, she is not entitled to take possession of such property, and enjoy the fruits and revenues thereof, until she shall have caused an inventory and appraisalment to be made of such property, and an abstract of said inventory to be registered in the book of mortgages in the parish in which the property is situated. *Succession of Landier*, 51 La. Ann. 968 (25 So. Rep. 938). A mortgagee in good faith, accepting his mortgage on the faith of a recorded title, based on a conveyance made by a husband as head and master of the community, is not affected by the fraud imputed to the husband with respect to his wife. Such a mortgage is not within the prohibition of alienation of property prescribed

by the Code, pending suit for the recovery of the property, the mortgagee being no party to such suit. *Lacassagne v. Abraham*, 51 La. Ann. 840 (25 So. Rep. 441). Where the surviving spouse, as usufructuary of community property makes no complaint that a mortgage granted by him upon the whole property does not cover the usufruct of the individual half of the deceased spouse, the heirs of the latter, as naked owners, have no standing to make such complaint. *Bonnecaze v. Lieux*, 52 La. 285 (26 So. Rep. 832). As to assessment of community property for taxes, see *Le Seigneur v. Bessam*, 52 La. Ann. 187 (25 So. Rep. 865).

#### Sec. 69. New Mexico.

(See Vol. III, § 85; Vol. VI, § 114; Vol. VII, § 62.) Where a husband remained in undisputed possession of community real estate from the death of his wife, in April, 1868, until 1882, when he sold the same without objection to a bona fide purchaser for value, the law will presume that the sale was lawfully made, and this presumption will prevail to protect the title of such purchaser, whether there were community debts at the death of the wife or not, in a suit by the heirs of the wife. *Crary v. Field*, N. M. (61 Pac. Rep. 118).

#### Sec. 70. Texas.

(See Vol. III, § 86; Vol. IV, § 70; Vol. V, § 68; Vol. VI, § 115; Vol. VII, § 63.) A woman living with an unmarried man as his cook, housekeeper and concubine without receiving specific wages therefor, during his acquisition of property, does not thereby acquire a community interest in the property. *Harris v. Hobbs*, 22 Tex. Civ. App. 367 (54 S. W. Rep. 1085). A house constructed upon the separate property of the wife, if paid for with community funds, becomes community property. *Maddox v. Summerlin*, 92 Tex. 483 (49 S. W. Rep. 1033). Where property is purchased with community funds, and the deed taken in the name of the wife, there is no presumption that it is to become her separate estate by gift from the husband. The title to property bought with separate funds of the wife and deed taken in her name vests in her; and the fact that improvements were subsequently made thereon, and paid for out of community money, would not divest her of title to the lot, nor any portion of it; nor would it give the husband or community such interest in the property as could be taken by execution against the husband. The community would be entitled to be reimbursed to the extent of its expenditures for such improvements, but the title to the property would be in the wife subject to this equity. *Schwartzman v. Cabell*. Tex. Civ. App. (49 S. W. Rep. 113). A husband and wife, by agreement between themselves and a conveyance to the husband through a third party, cannot transform her separate estate into community property. *Kellett v. Kellett*, 23 Tex. Civ. App. 571 (56 S. W. Rep. 766). Whenever, by the terms of a convey-

ance of land to the wife, it is recited therein that the consideration was paid out of her separate means, and the title is vested by the terms of the deed in her separate estate, then a creditor of the community, seeking to subject the land so conveyed to the payment of his debts, must show that the money which paid for it belonged to the community, and not to the separate estate of the wife. *Pontiac Buggy Co. v. Dupree*, 23 Tex. Civ. App. 298 (56 S. W. Rep. 703). The husband may mortgage the community property to satisfy a liability arising on account of a bond executed by him as surety for another during his wife's life time. *Hinzie v. Robinson*, 21 Tex. Civ. App. 9 (50 S. W. Rep. 635). A wife who has been abandoned by her husband may bind the community property for necessities and execute a valid mortgage thereon for debts incurred therefor. *Fermier v. Brannan*, 21 Tex. Civ. App. 543 (53 S. W. Rep. 699). Particular facts held insufficient to authorize a wife to charge her interest in the community, under Rev. Stat., § 2970, for debt incurred in the purchase of a home in another locality. *Bexar Building & L. Ass'n v. Heady*, 21 Tex. Civ. App. 154 (50 S. W. Rep. 1079). The lien of a judgment obtained by a third person against the husband pending divorce proceedings against him and which is duly recorded the day before the decree of divorce adjudging certain property to be community property and declaring a lien on it in her favor, is superior to the wife's lien. *Boyd v. Ghent*, 93 Tex. 543 (57 S. W. Rep. 25). Although the community interest of the wife in land conveyed to her husband is an equitable title, yet upon her death such interests descends to her children and will support an action of trespass to try title for the recovery thereof. *Arnold v. Hodge*, 20 Tex. Civ. App. 211 (49 S. W. Rep. 714). A sale of the community estate by the survivor entitles the heirs on partition to be remunerated for their share of the purchase price by having an allowance made to them out of the survivor's interest in the land remaining unsold. *Williams v. Emberson*, 22 Tex. Civ. App. 522 (55 S. W. Rep. 595).

#### **Sec. 71. Washington.**

(See Vol. III, § 87; Vol. IV, § 71; Vol. V, § 69; Vol. VI, § 116; Vol. VII, § 64.) A deed to land given to a husband and wife, reciting a valuable consideration, raises the presumption that the transfer was made to the community. *Hanna v. Reeves*, 22 Wash. 6 (60 Pac. Rep. 62). Property purchased by a married woman having no separate estate with borrowed money becomes community property. Bal. Ann. Codes and Stat., §§ 4488-4490, construed and applied. *Main v. Scholl*, Wash. (57 Pac. Rep. 800). The husband cannot sue alone to recover the rents and profits of community real estate. *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542 (58 Pac. Rep. 663). Laws 1891, p. 368, for the protection of bona fide purchasers of real estate, applies only to the purchasers of community property. *Sengfelder v. Hill*, 21 Wash. 371 (58 Pac. Rep. 250).

# CONTRACTS

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## EPITOME OF CASES.

**Sec. 72. Mutuality of contracts—Validity—Public policy.** If one party to a contract is not bound to do the act which forms the consideration for the promise, undertaking, or agreement of the other, the contract is void for want of mutuality. *Eclipse Oil Co. v. South Penn. Oil Co.*, 47 W. Va. 84 (34 S. E. Rep. 923). A contract by a railroad company whereby it grants to a telegraph company the exclusive right to maintain a telegraph line over its right of way is void. *Mobile & O. R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731 (26 So. Rep. 370). But a contract to convey land as a donation in consideration of the location and construction of a railroad along a certain route over the land of the donor is not invalid as against public policy. *Davis v. Williams*, 121 Ala. 542 (25 So. Rep. 704). Under Ia. Code 1873, § 1550, a contract for the sale of land, the whole or a part of the consideration for which is the illegal sale of intoxicating liquors, is "utterly null and void" and cannot be validated by the acquiescent acts of the parties. *Lindt v. Uihlein*, 109 Ia. 591 (79 N. W. Rep. 73). A contract by a married woman employing an attorney to secure a divorce for her to pay him a contingent fee of one-third of all property he may acquire for her in the action or by reason of any compromise or settlement thereof, is void and unenforcible, as against public policy. *Newman v. Freitas*, 129 Cal. 283 (61 Pac. Rep. 907). Citing, *Jordan v. Westerman*, 62 Mich. 170 (28 N. W. Rep. 826; 4 Am. St. Rep. 836).

**Sec. 73. Construction of contracts—Law of place—Particular cases.** Ordinarily a contract for the purchase of land is to be construed by the law of the place where the land is situated. *Latrobe v. Winans*, 89 Md. 636 (43 Atl. Rep. 829). A sum named in a bond as liquidated damages which a lessee agrees to pay to his sublessee if, through the

acts of the former, his lease should be terminated or the sublessee ousted before the expiration of the term, will be construed as liquidated damages and not as a penalty. *Guerin v. Stacey*, 175 Mass. 595 (56 N. E. Rep. 892). A contract with one owning tools and machinery connected with a stone quarry located upon land in his possession, in which he has an interest as purchaser, entered into with several parties who have associated themselves together, in which they agree to form a corporation and operate the quarry and purchase the property rights of the other party, upon their failure to organize the corporation, will be treated not as one between the vendor and a corporation, but as between individuals who entered into it. *Mosier v. Parry*, 60 O. St. 388 (54 N. E. Rep. 364).

**Sec. 74. Time as the essence of a contract.** In equity, time will be regarded as of the essence of a contract when it clearly and affirmatively appears that the parties intended that time should be essential. *Jewett v. Black*, 60 Neb. 173 (82 N. W. Rep. 375). Even though time is made the essence of the contract, equity will not permit a party to take advantage of his own laches to defeat the enforcement of the contract; and, where the party seeking to enforce the contract had in time complied with all its terms, equity will compel specific performance in his favor, though the other party has made default in time. *Dunn v. Yakish*, Okla. (61 Pac. Rep. 926). Where, by the terms of a written instrument, time is not made the essence of the contract, it nevertheless can be made so by a performance, or the tender of performance, by one party and a demand of the other. *Roberts v. Yaw*, Kan. (61 Pac. Rep. 409). Citing, *Foster v. Ley*, 32 Neb. 404 (49 N. W. Rep. 450; 15 L. R. A. 737, and note); *Frink v. Thomas*, 20 Or. 265 (25 Pac. Rep. 717; 12 L. R. A. 239, and note); *Barnard v. Lee*, 97 Mass. 92; *Hatch v. Cobb*, 4 Johns. Ch. 559; *Sea v. Morehouse*, 79 Ill. 216; *King v. Ruckman*, 20 N. J. Eq. 316; *Kirby v. Harrison*, 2 O. St. 326-332 (59 Am. Dec. 677); *Rummington v. Kelley*, 7 Ohio, 97, pt. 2; *Higby v. Whittaker*, 8 Ohio, 201; *Benedict v. Lynch*, 1 Johns. Ch. 370-376 (7 Am. Dec. 484).

**Sec. 75. Breach of contract—Action for—Measure of damages.** The lack of an allegation on behalf of the plaintiff in an action for damages for non-performance of a land contract, that he had performed his part of the contract, is cured by denial of such performance in the answer. *Ricketts v. Hart*, 150 Mo. 64 (51 S. W. Rep. 825). A vendee who has occupied land under a parol contract of purchase which his vendor refuses to perform may recover the amount of cash paid by him on the contract and the reasonable value of his service in working the land, above the net income derived therefrom. *Miller v. Metz*, 103 Wis. 220 (79 N. W. Rep. 213). The measures of damages for breach of an agreement to convey land in consideration of the assignment of a timber contract is the value of the land and not merely the value of the assigned contract. *Bryant v. Everly*, Ky. (57 S. W. Rep. 231).

**Sec. 76. Fraud—Presumptions—False representations.** A presumption of fraud arises where there is a great inequality between the value of the property sold and the price which is to be paid for it, and in the absence of clear and satisfactory evidence on the part of him who seeks the benefit of such a contract that it was entered into with deliberation or knowingly by the party resisting or repudiating it, the presumption becomes conclusive. *Mann v. Russey*, 101 Tenn. 596 (49 S. W. Rep. 835). A false representation by a vendor as to the amount which it will require to discharge a mortgage on the premises held by a building and loan association purporting to convey information from it on this point, constitutes a statement of fact upon which the vendee has a right to rely. *Loucks v. Taylor*, 23 Ind. App. 245 (55 N. E. Rep. 238). A lessee of ground for a temporary restaurant and lodging place near the grounds of a public exhibition cannot recover damages for the false representations of his lessor as to special advantages his location would enjoy, where, from all the evidence, it appears that if his location had enjoyed the advantages represented it would have been a matter of pure speculation whether any profit would have been realized by him. *Myers v. Turner*, Tenn. (52 S. W. Rep. 332).



**Sec. 77. Fraud—Representations as to title, location, amount or condition.** A vendee may have rescission on account of his vendor knowingly concealing or misrepresenting defects or incumbrances on his title. *Spencer v. Sandusky*, 46 W. Va. 582 (33 S. E. Rep. 221). False representations by a vendor as to the location of land made to a vendee unacquainted with its location may be the ground for a rescission; and a vendor of land, who by his false representations has deceived a purchaser in respect to its location, will not be permitted, in an action, to excuse his fraudulent acts by the negligence of such purchaser in not examining some map or record from which he might have ascertained the true location of the land, or in otherwise failing to make an investigation or inquiry by which the falsity of such representation might have been exposed. *Rohrof v. Schulte*, 154 Ind. 183 (55 N. E. Rep. 427). A representation made by a vendor that property is located on the best resident street in a city is not rendered false by that fact it is not on the best portion of such street. *Hallinger v. Zimmerman*, 58 N. J. Eq. 217 (42 Atl. Rep. 726). A rescission may be had for the vendor's wilful misrepresentation as to the quantity of land sold. *Spoor v. Tilson*, 97 Va. 279 (33 S. E. Rep. 609). False representations as to the newness of a building, made with an intent to deceive, and relied upon by one to his injury, may afford ground for action, *Eibel v. Von Fell*, 63 N. J. L. 3 (42 Atl. Rep. 754); and so may false representations as to the elevation of a lot with reference to the grade of an adjoining street, *Dinwiddie v. Stone*, Ky. (52 S. W. Rep. 814; 21 Ky. Law Rep. 584). Where parties to a contract for the exchange of property were present at the time of the preparation and execution of the contract, during the negotiations discussed the question as to the vacancy and rental value of a certain piece of property, and the vendor of which refused to sign the agreement unless it stipulated that the property was "vacant, or subject to tenant at \$8 per month," the vendee cannot defeat specific performance of the agreement which contained such stipulation on the ground of misrepresentations, the property in fact being vacant. *Hallinger v. Zimmerman*, 58 N. J. Eq. 217 (42 Atl. Rep. 726).

**Sec. 78. Fraud—Willful misrepresentations by vendor as to quality or value—Right of vendee to rely on.** Equity will not relieve one on account of false representations as to value, where he had been negligent in the use of the means and opportunity afforded him for ascertaining their falsity. *Jones v. Rush*, 156 Mo. 364 (57 S. W. Rep. 118). A purchaser of distant lands which he has not seen may have a rescission where he was induced to make the purchase by relying on the false and fraudulent representations of his vendor knowingly and intentionally made to defraud and deceive such purchaser, as to the value, state of cultivation, improvement, character and accessibility of the lands. *Clinkenbeard v. Weatherman*, 157 Mo. 105 (57 S. W. Rep. 757). If property offered for sale or exchange be in a distant locality and the vendee, to the vendor's knowledge, has no personal information in regard to it, and the latter misrepresents its value or quality for the purpose of inducing a trade and by artifice prevents the former from seeking information elsewhere or by a personal examination of the property, such misrepresentations are not mere expressions of opinion, but misrepresentations in regard to a material fact, which form a sufficient basis for an action for fraud. *Horton v. Lee*, 106 Wis. 439 (82 N. W. Rep. 360). Citing, *Witherwax v. Riddle*, 121 Ill. 140 (13 N. E. Rep. 545); *Harris v. McMurray*, 23 Ind. 9; *Cressler v. Rees*, 27 Neb. 515 (43 N. W. Rep. 363; 20 Am. St. Rep. 691); *McKnight v. Thompson*, 39 Neb. 752 (58 N. W. Rep. 453); *Simar v. Canaday*, 53 N. Y. 298 (13 Am. Rep. 523); *Saunders v. Hatterman*, 24 N. C. 32 (37 Am. Dec. 404); *Henderson v. Henshall*, 4 C. C. A. 357 (54 Fed. Rep. 320); *Chrysler v. Canaday*, 90 N. Y. 272 (43 Am. Rep. 166); *Bigelow*, *Fraud*, 496.

A conveyance of land obtained in exchange for stock in a corporation by false representations of the agent of the owner of the stock as to its value will be rescinded, where such statements consisted of representations of facts of which he claimed to have knowledge and were relied upon by the owner of the land, although no confidential relation existed between them and the latter was not prevented from investigating the truth of the representations, and did not make such investigation and would not have been able to learn as to their truth had he investigated. *Dow v. Swain*, 125 Cal. 674 (58 Pac. Rep. 271). The court say:

"I do not subscribe to the idea that under all circumstances an actual examination by the buyer will shield the wrongdoer from an action for damages. Every case must be judged for itself, and the circumstances which warrant or forbid relief cannot be scheduled. If the seller knows the facts, and the buyer is ignorant, and to the knowledge of the seller the buyer relies upon the representations, I see no reason why relief should not be granted, although an imperfect examination was made. It may have been imperfect because of the representations. Means were used to prevent the examination, and it would not be going far to say that the relation is made confidential by the mere making of the representation with the knowledge that it will be acted upon. Civ. Code, § 2219. 'It is now settled law that one who chooses to make positive assertions without warrant will not excuse himself by saying that the other party need not have relied upon them. He must show that his representations were not in fact relied upon. In the same spirit it is now understood that the defense of contributory negligence does not mean that the plaintiff is to be punished for his want of caution, but that an act or default of his own, and not the negligence of the defendant, was the approximate cause of his damage.' Webb. Pol. Torts, 378; and see note, where numerous authorities are cited. In Bish. Non-cont. Law, § 330, it is said: 'That plaintiff is too credulous is not generally a defense. 'The test of the representation is its actual effect on the particular mind, whether it is a strong and circumspect mind, or one weak and too relying.' See, also, Bigelow, Frauds, 524. 'Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.' Mead v. Bunn, 32 N. Y. 275. To the same effect are Eaton v. Winnie, 20 Mich. 156 (4 Am. Rep. 377); McBeth v. Craddock, 28 Mo. App. 380, and numerous cases there cited."

**Sec. 79. Knowledge of falsity of representations and wilfulness of party making them as a requisite to action**

**therefor—Concealment of facts.** False representations afford no ground for relief at law, unless they were known to be untrue by the party making them, or were made as of his own knowledge, without knowing whether they were true or not. *Poppleton v. Bryan*, 36 Or. 69 (58 Pac. Rep. 767). Wherever a party makes a false representation of a material fact to a person ignorant thereof, with intention that it shall be acted upon, followed by reliance upon and by action thereon, amounting to a substantial change of position, and the special situation or means of knowledge of the party making the statement were such that it was his duty to know as to the truth or falsity of the representation, such party is in law guilty of fraud as much so as if he actually knew that his statement was false. *Watson v. Jones*, 41 Fla. 241 (25 So. Rep. 678). See opinion for review of authorities on this subject. Upon this subject the supreme court of Wisconsin, in the case of *Krause v. Busacker*, 105 Wis. 350 (81 N. W. Rep. 406), say: "The claim that in an action at law to recover damages for materially false representations, by which the purchase of property is induced, the representations must be shown to have been wilfully false, cannot be sustained. The question has been settled in this court by numerous adjudications, and it is not deemed necessary to review them. If the representations were material and false, and the maker thereof either knew or ought to have known that they were false, or if he made them recklessly, with no knowledge on the subject, and the injured party relied upon them as true, without the present means of knowledge of their falsity, and suffered damage thereby, then the fraud is complete." A vendor, with knowledge of his vendee's inability to read and confidence in him, who, when reading his deed to such vendee, fails to read a clause therein assuming the payment of the balance of a mortgage, by which the latter is made to assume an obligation greater than it was his purpose to do, is guilty of a fraud. *Loucks v. Taylor*, 23 Ind. App. 245 (55 N. E. Rep. 238).

**Sec. 80. Fraud—Statements of opinion or intention.** Representations of a vendor that his land is worth a certain sum per acre, are mere expressions of opinion. *Buxton v. Jones*, 120 Mich. 522 (79 N. W. Rep. 980). Statements made by a landlord's agent to a prospective tenant in answer

to objections in regard to the floor and light in a building that they would be all right when certain changes were made, are promissory and in the nature of opinions on which the tenant has no right to rely. *Boyer v Commercial Bldg. Inv. Co.*, 110 Ia. 491 (81 N. W. Rep. 720). Promissory representations by the vendors of lots in a proposed town as to industries to be established and public improvements to be made by them and others, though not carried out, do not entitle the purchaser to a rescission on the ground of fraudulent misrepresentation. *Livermore v. Middlesborough Town-Lands Co.*, Ky. (50 S. W. Rep. 6; 20 Ky. Law Rep. 1704); *Pine Mountain Iron & Coal Co. v Ford*, Ky. (50 S. W. Rep. 27; 21 Ky. Law Rep. 142); *Jones v. Middlesborough Town-Lands Co.*, Ky. (50 S. W. Rep. 28; 20 Ky. Law Rep. 1744); *Ryan v. Middlesborough Town-Lands Co.*, Ky. (52 S. W. Rep. 33); *Decatur Mineral & Land Co. v. Friedman*, Ky. (56 S. W. Rep. 11; 21 Ky. Law Rep. 1642). Particular representations by a vendor's agent held merely to be an expression of opinion. *Stevens v. Alabama State Land Co.*, 121 Ala. 450 (25 So. Rep. 995).

**Sec. 81. Rescission of contracts.** A contract, written or oral, for the sale of land, may be orally rescinded; but mere oral rescission does not divest the party of his estate, or bar him of specific performance, without destruction of the written contract, or, if oral, surrender of possession. *Cunningham v. Cunningham*, 46 W. Va. 1 (32 S. E. Rep. 998). Where a vendor fails to perform his agreement to make a good general warranty deed free from all incumbrances, at the time agreed upon for the consummation of the sale, the vendee may abandon the purchase, cancel the contract and apply to a court of equity to place him in statu quo, where his vendor refuses to do so. *Parsons v. Smith*, 46 W. Va. 728 (34 S. E. Rep. 922).

**Sec. 82. Rescission of contracts—Placing parties in statu quo—Effect of one's inability to do so without his fault.** One who seeks to rescind a contract must return or offer to return whatever he has received under it. *State v. Blize*, 37 Or. 404 (61 Pac. Rep. 735). A grantor in a deed of homestead who seeks its cancellation on account

of imperfect execution, does not comply with the rule of equity requiring that the parties be placed in statu quo by setting up a claim against the grantee for timber cut on the land as a set off against the price received by such grantor which he should return. *Loxley v. Douglas*, 121 Ala. 575 (25 So. Rep. 998). In an action by a grantor to cancel his conveyance on account of fraud in the transaction, it is sufficient for him to offer to return the note executed to him for the purchase price. *Wenegar v. Bollenbach*, 180 Ill. 222 (54 N. E. Rep. 192). One who seeks to rescind an exchange of lands fraudulently procured by a broker, employed by him to sell or exchange his land, conveying to him lands belonging to such broker in the name of a fictitious grantor, makes sufficient tender by tendering to such broker a reconveyance to such fictitious grantor which is followed by a deposit of the deed in court, subject to its order upon the broker's refusal to accept it, such vendee having offered to convey the land to the broker or any other person whom he might designate. *Rohrof v. Schulte*, 154 Ind. 183 (55 N. E. Rep. 427).

The right of one entitled to the rescission of a contract for the exchange of lands is not defeated by the fact of his inability to restore all the land which he received, on account of a part of it having been washed away by the return of a river to an old channel which joined the land, and to which the river was liable to return at any time. *Hale v. Kobbert*, 109 Ia. 128 (80 N. W. Rep. 308). The court say: "The general rule is that one must restore, or offer to restore, the consideration received, before equity will grant relief through rescission of a contract. But this rule has some exceptions. To enforce it in all cases strictly according to its terms would work great injustice at times. Restoration in full may, as in the case at bar, be impossible, without fault on the part of the person seeking rescission. Where the property is perishable and lost despite the care of the holder, or when it is lost in whole or in part through some inherent defect that existed at the time of its conveyance, the grantee is called upon to restore only what he can. *Neblett v. McFarland*, 92 U. S. 101; *Masson v. Bovet*, 1 Denio, 69 (43 Am. Dec. 651); *Henninger v. Heald*, 51 N. J. Eq. 74 (26 Atl. Rep. 449); *Strodder v. Granite Co.*, 99 Ga. 595 (27 S. E. Rep. 174);

Hilton v. Thresher Co., 8 S. Dak. 412 (66 N. W. Rep. 816; Wright v. Dickinson, 67 Mich. 580 (35 N. W. Rep. 164; 11 Am. St. Rep. 602). Here the agency by which this land was destroyed existed when the trade was made. It then menaced the land with loss, for, although the stream was at that particular time at some distance, its treacherous character was well known, and the land lay upon the border of its recent bed."

**Sec. 83. Rescission of contract for exchange of land—Transfer of liens.** A court of equity in decreeing a rescission of the exchange of lands may transfer a mortgage, with the consent of the mortgagee, which has been placed on the land received by the plaintiff in exchange, to the land restored to him, when the rescission otherwise could not be had. In such a case the decree by its own force makes the mortgage a lien on the land from its date, and the interest of the party in the land restored is simply an equity of redemption; and an execution of a judgment levied on such land immediately after the decree of rescission is inferior to the lien of such mortgage. *Stevens v. McCoy*, 60 O. St. 540 (54 N. E. Rep. 517).

**Sec. 84. Loss or waiver of right to rescind.** One having the right to rescind a contract on account of fraud may lose this right by an inexcusable delay in asserting it after having knowledge of the facts constituting the fraud. *McQueen v. Burhans*, 77 Minn. 382 (80 N. W. Rep. 201); *Precious Blood Soc. v. Elsythe*, 102 Tenn. 40 (50 S. W. Rep. 759); *Dundee Mortg. & T. Inv. Co. v. Goodman*, 36 Or. 453 (60 Pac. Rep. 3). This rule is statutory in California. Civ. Code, § 1691. *Harrington v. Paterson*, 124 Cal. 542 (57 Pac. Rep. 476). He must act promptly upon discovery of fraud; he cannot after such discovery treat the contract as in force, receive benefits therefrom and have a rescission when it proves unprofitable. *Stephenson v. Allison*, 123 Ala. 439 (26 S. Rep. 290); *A. Landreth Co. v. Schevenel*, 102 Tenn. 486 (52 S. W. Rep. 148). Where the parties to a contract for the exchange of lands, upon a discovery of a defect in the title of one of them, agree to an exchange of possession and deposit their deeds in escrow to be delivered when the defect is remedied and

the party receiving the land to which the title is defective afterward grants a permanent easement for a right of way over it to another, he thereby waives the defects in such title and his right to a rescission on account thereof. *Bollnow v. Novacek*, 184 Ill. 463 (56 N. E. Rep. 801).

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## CORPORATIONS

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### EPITOME OF CASES.

**Sec. 85. Ownership of lands by corporations—Statutory limitations.** A building and loan association has no power to deal in real estate except as authorized by statute; and Ill. Laws 1879, p. 83 authorizing such associations to purchase any real estate upon which they have or hold any mortgage, lien, incumbrance or interest does not authorize such association to purchase real estate in which it has no interest and to assume incumbrances thereon. *National Home B. & L. Ass'n v. Home Sav. Bank*, 181 Ill. 35 (54 N. E. Rep. 619; 72 Am. St. Rep. 245). Construing and applying Neb. Comp. Stat., ch. 16, §§ 42, 55, it is held that an incorporated religious society has no power to acquire or hold real estate for any purpose other than that of promoting the object of its creation; and a contract entered into by such corporation for the purchase of land as a speculation merely is ultra vires and void. *Thompson v. West*, 59 Neb. 677 (82 N. W. Rep. 13; 49 L. R. A. 337).

**Sec. 86. Contracts and conveyances by—Power to make and manner of execution.** A water company to which a city by ordinance has granted the right to occupy its streets for the laying of pipes, erection of hydrants and other privileges usually enjoyed by water companies, legally may alienate or incumber its property, including the right to supply the city and its inhabitants with water under such ordinance, with the right to take tolls, etc. *State v. To-*



peka Water Co., 61 Kan. 547 (60 Pac. Rep. 337). See opinion for collation of authorities. *Ida. Rev. Stat.*, § 2764 construed and applied—power of benevolent corporation to sell or incumber its property. *Portneuf Lodge v. Western L. & Sav. Co.*, *Ida.* (59 Pac. Rep. 362). A lease executed in the name of a corporation, signed by its secretary and attested by its corporate seal will be presumed to have been executed under authority of the corporation. *West Side Auction House Co. v. Connecticut Mut. L. Ins. Co.*, 186 Ill. 156 (57 N. E. Rep. 839). The deed of a corporation without its seal passes an equitable estate. *Precious Blood Soc. v. Elsythe*, 102 Tenn. 40 (50 S. W. Rep. 759). For an extensive discussion of the statutory provisions of Missouri as to the necessity of a seal to the deed of a private corporation, see *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565 (57 S. W. Rep. 1095).

**Sec. 87. Mortgages by corporations.** Construing and applying Cal. Civ. Code, § 305, providing that the corporate powers, business and property of all corporations must be exercised, conducted and controlled, by a board of not less than five nor more than eleven directors, it is held that a mortgage executed by a corporation organized with a board of five directors at a time when a vacancy in the board reduced it to four, which afterward is ratified by a full board, the vacancy having been filled, is valid. *Porter v. Lassen Co. Land & Cattle Co.*, 127 Cal. 261 (59 Pac. Rep. 563). Where the directors of a corporation are restricted by its charter, or the laws of the state from which it derives its existence, in holding meetings of a corporate character, to the limits of the state in which it is incorporated, it is held that a mortgage executed by a corporation in pursuance of an order of its board of directors made at a meeting held by them in a foreign state, is void, although such mortgage was made on land located in the state in which meeting was held and to secure a creditor in that state, and although such corporation is authorized by statute to do business and have an office in such foreign state; and such mortgage cannot be validated after the rights of third parties have intervened, by an order of such directors at a meeting held in the state in which the cor-

poration was organized. *Union Nat. Bank v. State Nat. Bank*, 155 Mo. 95 (55 S. W. Rep. 989; 78 Am. St. Rep. 560).

**Sec. 88. Conveyance executed by vice-president of a corporation—Presumptions as to authority.** The deed of a corporation executed by a vice-president carries with it a presumption of his authority to do the act. *Ellison v. Branstrator*, 153 Ind. 146 (54 N. E. Rep. 433). The court say: "It is insisted that the court erred in admitting in evidence a deed purporting to be executed by the Lake Erie, Wabash & St. Louis Railroad Company. The objections made to this instrument were that it appeared to have been executed by the vice-president of the company, instead of the president; that in such case the authority of the vice-president to execute the instrument must be shown; and that this deed was not executed in the manner required by law. In our opinion, none of the objections is well founded. Unless otherwise provided by statute, the charter of the corporation, or its by-laws, the deed of a corporation may be executed as well by its vice-president as by its president, and, when so executed, with other necessary formalities, it will be presumed that the vice-president had authority to act on behalf of the corporation. *Smith v. Smith*, 62 Ill. 493; *Colman v. Land Co.*, 25 W. Va. 148; *Lewis v. Railroad Co.*, 95 N. C. 179; *Shaffer v. Hahn*, 111 N. C. 1 (15 S. E. Rep. 1033); *Sawyer v. Cox*, 63 Ill. 130; *Bowers v. Hechtman*, 45 Minn. 238 (47 N. W. Rep. 792); *Ballard v. Carmichael*, 83 Tex. 355 (18 S. W. Rep. 734). In the case before us the deed purported to be executed by the corporation, and to be attested by its seal. Its formal parts were as follows: 'The Lake Erie, Wabash St. Louis Railroad Company convey and warrant to Enos Pomeroy, of \* \* \*, the lands and premises situate in the county of Allen, in the state of Indiana, described as follows, to wit: \* \* \*. In witness whereof the said Lake Erie, Wabash & St. Louis Railroad Company have caused their corporate seal to be hereunto affixed, and these presents to be signed by their vice-president, this 25th day of January, A. D. 1855. Signed, sealed, and delivered in the presence of [the word "second," on the 17th line written on, erased before delivery] Jno. M. Drummond. Secy. I. C.

Colton, Vice-President L. E. W. & St. L. R. R. Co. [Seal.]' The deed was duly acknowledged by Isaac C. Colton in his official capacity as the vice-president of the railroad company, for and on behalf of the company, and his affidavit that the seal of the company was affixed by the authority of the directors was incorporated in the acknowledgment. In a recent work on Corporations it is said: 'A very extensive principle in the law of corporations, applicable to every kind of written contract executed ostensibly by the corporation, and to every kind of act done by its officers in its behalf, is that, where the officer or agent is the appropriate officer or agent to execute a contract, or to do an act of a particular kind, in behalf of the corporation, the law presumes a precedent authorization, regularly and rightfully made; and it is not necessary to produce evidence of such authority from the records of the corporation. Under the operation of this principle, a deed or mortgage purporting to have been executed by a corporation, which is signed and acknowledged in its behalf by its president and secretary, will be presumed to have been executed by its authority.' *Thomp. Corp.*, § 5029. See, also, *National State Bank of Terre Haute v. Vigo Co. Nat. Bank*, 141 Ind. 352 (40 N. E. Rep. 799; 50 Am. St. Rep. 330); *Gorder v. Canning Co.*, 36 Neb. 548 (54 N. W. Rep. 830); *New England Wiring & Construction Co. v. Farmington Elec. Light & Power Co.*, 84 Me. 284 (24 Atl. Rep. 848); *Steel Works v. Bresnahan*, 60 Mich. 332 (27 N. W. Rep. 524); *Malone v. Transportation Co.*, 77 Cal. 38 (18 Pac. Rep. 858); *Means v. Swormstedt*, 32 Ind. 87 (2 Am. Rep. 330); *Pearse v. Welborn*, 42 Ind. 331; *Devl. Deeds*, § 343, and note. The secretary of a corporation is the proper custodian of the corporate seal, and when he affixes it to a deed or other instrument the presumption is that he did it by the direction of the corporation; and it devolves upon those who dispute the validity of the instrument to prove that he acted without authority. It is also presumed that the seal of the corporation was rightfully affixed to any deed or instrument on which it appears. *Evans v. Lee*, 11 Nev. 194; *Bowers v. Hechtman*, 45 Minn. 238 (47 N. W. Rep. 792); *Thomp. Corp.*, § 5106, and cases cited in note 5. It is said in *Kelly v. Calhoun*, 95 U. S. 710, in speaking of a deed executed by a railroad company, to which objection

was made: 'Instruments like this should be construed, if it can be reasonably done, "ut res magis valeat quam pereat." It should be the aim of courts, in cases like this, to preserve, and not to destroy. Sir Matthew Hale said they should be astute to find means to make acts effectual according to the honest intent of the parties. *Rose v. Tranmarr, Willes, 682.*'"

**Sec. 89. Doctrine of ultra vires and its application.**

The doctrine of ultra vires should not be applied when it would defeat the ends of justice or work a legal wrong. *Burke Land & Live-Stock Co. v. Wells, Fargo & Co., Ida.* (60 Pac. Rep. 87). In Nebraska it is held that a contract of a corporation which is void on account of being ultra vires cannot be ratified by it, *Thompson v. West, 59 Neb. 677 (82 N. W. Rep. 13; 49 L. R. A. 337)*; and in Illinois it is held that an ultra vires contract is void, and a corporation accepting the benefits of such a contract is not bound by it, on the ground of estoppel. *National Home B. & L. Ass'n v. Home Sav. Bank, 181 Ill. 35 (54 N. E. Rep. 619; 72 Am. St. Rep. 245)*. But in other states it is held that where a contract has been executed by a corporation and fully performed according to its terms by either of the parties to it, neither party will be permitted to say that the contract was not within the power of the corporation. *International Bldg & L. Ass'n v. Bratton, 24 Ind. App. 654 (56 N. E. Rep. 105)*; *Portneuf Lodge v. Western L. & Sav. Co., Ida.* (59 Pac. Rep. 362); *City of Spokane v. Amsterdansch Trustees Kantoor, 22 Wash. 172 (60 Pac. Rep. 141)*. A corporation which assumed to have authority to execute a mortgage, received the money borrowed on account thereof, and applied it to corporate purposes, cannot raise the question of ultra vires in the making of the mortgage. *Union Trust Co. v. Mercantile Library Hall Co., 189 Pa. St. 263 (42 Atl. Rep. 129)*. A benevolent corporation which has paid the principal of a usurious mortgage, the execution of which was ultra vires because prohibited by statute, may have the mortgage cancelled as a cloud upon its title. *Portneuf Lodge v. Western L. & Sav. Co., Ida.* (59 Pac. Rep. 362).

A lease taken by a corporation authorized "to carry on

a general brewing and malting business and manufacture soda waters," in which it is stipulated that the premises are "to be occupied for a saloon and no other purpose whatever," is not ultra vires. *Brewer & Hofmann Brewing Co. v. Boddie*, 181 Ill. 622 (55 N. E. Rep. 49). The court say: "Had appellant confined the use of the premises to the sale of soda water, it would certainly have been acting within the scope of its charter, but it had no power to engage in the business of retailing intoxicating liquors or to rent and carry on a liquor saloon. We cannot, however, say, as a matter of law, that the word 'saloon,' as used in the lease, meant a place where intoxicating liquors were to be sold, and not a place for the sale of soda water. There may be many different kinds of saloons, and the lease is wholly silent as to the kind of saloon for which the premises were to be used. A saloon may or may not mean a place for the retail of spirituous liquors. *Snow v. State*, 50 Ark. 561 (9 S. W. Rep. 306); *Springfield v. State*, Tex. App. (13 S. W. Rep. 752); *State v. Mansker*, 36 Tex. 365. Places for the retail of spirituous liquors are in the statutes of this state generally termed dramshops or tippling houses. The premises were used by appellant partly for purposes permissible by its charter and partly for purposes not so permissible. If appellant had covenanted to carry on in the premises the business of a retail liquor dealer, it would not have been bound by such covenant, for the reason that it had no power to engage in that business and consequently no power to bind itself to do so. But it had power, incidental to its express powers, to rent the premises as a place, or even a saloon, in which to sell its soda water, and if, in addition to the sale of soda water, it retailed intoxicating liquors, and kept a dramshop or tippling house, its lease contract with appellee was not thereby rendered void."

**Sec. 90. Municipal corporations—Power to acquire lands.** A city having power under a statute to purchase land for the erection of public buildings thereon, and having no authority to sell any land so purchased, cannot, after having selected and purchased land in pursuance of such legislation, purchase other land, not adjacent to the first purchase, for the same purpose. *State v. Mayor of Atlantic*

City, 63 N. J. L. 91 (42 Atl. Rep. 781). A conveyance of land taken by a state in pursuance of a statute (Or. Laws 1893, p. 136) authorizing it to acquire land for a certain purpose, is not rendered a nullity by the statute subsequently being declared unconstitutional. *State v. Blize*, 37 Or. 404 (61 Pac. Rep. 735). Citing, *King v. Philadelphia Co.*, 154 Pa. St. 160 (26 Atl. Rep. 308; 21 L. R. A. 141; 35 Am. St. Rep. 817). A power conferred upon a city by statute (Va. Laws 1895-96, p. 201) "to purchase, hold, sell and convey real and personal property necessary for its uses and purposes," must be exercised within the limits of the city; and such a statute does not authorize the city to own and operate a rock quarry. *Duncan v. City of Lynchburg*, Va. (34 S. E. Rep. 964; 48 L. R. A. 331).

**Sec. 91. Municipal corporations—Contracts and conveyances by—Statutes construed.** A committee authorized to execute a conveyance on behalf of a municipal corporation cannot exceed the terms specified in the resolution authorizing it to convey. *Urch v. City of Portsmouth*, 69 N. H. 162 (44 Atl. Rep. 112). A mayor of a city duly authorized by ordinance to lease offices for its officers may make a lease of such rooms for ten years, unless the city should erect a building of its own. *City of Michigan City v. Leeds*, 24 Ind. App. 271 (55 N. E. Rep. 799).) Mills' Ann. Colo. Stat., § 774, 776, making each organized county a body corporate and empowering it through its board of commissioners, to purchase and hold real and personal estate for the use of the county; to sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interest of the inhabitants; to make all contracts and do all other acts in relation to the property and concerns necessary to the exercise of its corporate or administrative powers, does not authorize the board of commissioners of a county taking a conveyance of land for a court house site to bind the county by a stipulation therein that it will maintain the county court house on such lands perpetually. *Colburn v. Board of Com'rs*, Colo. App. (61 Pac. Rep. 241). A statute (Mass. Laws 1897, ch. 500, §17) authorizing a city to lease a tunnel constructed by it at public expense, to a street railway company in consid-

eration of a certain per cent. of its annual receipts, is constitutional. *Browne v. Turner*, 176 Mass. 9 (56 N. E. Rep. 969). N. C. Code, § 3824 authorizing an incorporated town to sell "any property real or personal belonging to" it, does not authorize it to sell land which, by the terms of the act of incorporation, is to be held in trust for the town or which is devoted to purposes of government. *City of Southport v. Stanly*, 125 N. C. 464 (34 S. E. Rep. 641). Pa. Pub. Laws 1836, p. 318, construed and applied—power of City of Pittsburgh to lease public landing. (*Reighard v. Flinn*, 189 Pa. St. 355 (42 Atl. Rep. 23; 43 L. R. A. 502).)

**Sec. 92. Miscellaneous Notes.** Land conveyed in fee for a valuable consideration to a turnpike road company does not revert to the grantor upon the company's ceasing to exist. *Langston v. Edwards*, Ky. (54 S. W. Rep. 833; 21 Ky. Law Rep. 1277). A camp-meeting association, that has laid out its grounds into cottage lots, streets and squares, and has made perpetual leases of the lots without other restriction than that they are "subject to such rules and regulations as the association may from time to time adopt," cannot afterward, for revenue purposes, impose a license tax on persons visiting the occupants of cottages on such lots to obtain orders for family supplies. *Northport Wesleyan Grove Camp-Meeting Ass'n v. Perkins*, 93 Me. 235 (44 Atl. Rep. 893; 74 Am. St. Rep. 342; 48 L. R. A. 272). As to the liability of a corporation organized for the purpose of purchasing land, for the fraudulent acts of persons promoting its organization, see *Spaulding v. North Milwaukee Town-Site Co.*, 106 Wis. 481 (81 N. W. Rep. 1064). Cal. Civ. Code, §§ 571, 574, subd. 5 construed and applied—power of savings and loan associations to purchase mortgages. *Savings Bank of San Diego Co. v. Barrett*, 126 Cal. 413 (58 Pac. Rep. 914). Pa. Laws 1878, Act May 25, construed and applied—sale of property of corporation under judicial process—corporate character and title of purchaser. *Gas & Water Co. v. Corporation of Downingtown*, 193 Pa. St. 255 (44 Atl. Rep. 282). Tenn. Laws 1875, ch. 142, § 29 construed and applied—force and effect of deed to corporation not in existence, upon its becoming duly incorporated. *Cumberland Land Co. v. Daniel*, Tenn. (52 S. W. Rep. 446).

# COVENANTS

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## EPITOME OF CASES.

**Sec. 93 Covenants running with the land.** Statutory provisions (N. Dak. Rev. Codes, §§ 3784-3787) which declare what covenants in grants of real estate run with the land, and designate a number of such covenants by name, do not confine covenants which run with the land to those specifically named, but such covenants as by reason of their character are within the meaning of the statute also run with the land. *Northern Pac. Ry. Co. v. McClure*, 9 N. Dak. 73 (81 N. W. Rep. 52; 47 L. R. A. 149). The court say: "We do not think these sections aid counsel's contention, for an examination of them makes it obvious that the legislature did not undertake to enumerate by name all of the particular covenants which run with the land, and pass to assigns and grantees. These sections, taken together, have a twofold purpose: They declare the effect of covenants which run with the land to be as binding upon the assigns of the covenantor and covenantee as if they had been personally made by them. In addition, they declare the test as to what constitutes a covenant which runs with land, by the aid of which courts must determine in each particular case whether a covenant in question comes within the statute. At common law the principle which determined whether a covenant run with the land required that it be, in a sense, inherent in the estate demised, or connected with it, or that it touched the land or its value, or the value of the reversion or of the term, or went to fix the amount of the rent. See *Norman v. Wells*, 17 Wend. 136; *Allen v. Culver*, 3 Denio, 284; *Dolph v. White*, 12 N. Y. 296. Certainly our statute does not restrict us to narrower limits, for its express language extends to covenants 'appurtenant to such estates,' covenants 'for the direct benefit of the property or some part of it then in existence,' and those which 'are incidental thereto.' The conclusion



cannot be drawn that because § 3787 enumerates five of the most common covenants, namely, of warranty, for quiet enjoyment, for further assurance, for payment of rent, and for payment of taxes and assessments, as running with the land, that all others are excluded. The language of the section itself forbids such a construction, for it shows that these particular covenants are merely included among those not mentioned. Further, it is not conceivable that the legislature intended to limit such covenants to those mentioned, and exclude the great number which have for generations been held as covenants running with the land, and as binding assigns. Among those, we name but a few: Covenants to repair. *Shelby v. Hearne*, 6 Yerg. 512; *Allen v. Culver*, 3 Denio, 284. To pay for improvements. *Ecke v. Fetzer*, 65 Wis. 55 (26 N. W. Rep. 266). Not to erect and operate a rival mill. *Norman v. Wells*, 17 Wend. 136. To leave in repair. *Demarest v. Willard*, 8 Cow. 206; *Myers v. Burns*, 33 Barb. 401. To maintain existing fences. *Hartung v. Witte*, 59 Wis. 285 (18 N. W. Rep. 175); *Kellog v. Robinson*, 6 Vt. 276 (27 Am. Dec. 550). For right of ingress and egress to and from a building. *Bush v. Calis*, 1 Show. 389. Not to assign or underlet. *Williams v. Earle*, 9 Best & S. 740. Not to erect a building in front of the demised premises. *Trustees v. Cowen*, 4 Paige, 510 (27 Am. Dec. 80). Not to plow or cultivate in a certain manner. *Cockson v. Cock*, Cro. Jac. 125. To use land in a husbandlike manner, and leave it in like condition. *Walsh v. Watson*, Esp. N. P. 295. To manure land each year. — *v. Davis*, M. S. M. T., 42 Geo. 111. To leave land with certain crops planted. *Hooper v. Clark*, 8 Best & S. 150. To reside on the premises during the term. *Taltem v. Chaplin*, 2 H. Bl. 133. Not to carry on particular trades on the premises. *Baron v. Richard*, 3 Edw. Ch. 96. To erect only buildings of a certain kind, and use them only for a specified purpose. *St. Andrew's Lutheran Church's Appeal*, 67 Pa. St. 512. To erect buildings on the premises. *Fisher v. Lewis*, 3 Pa. Law J. 73. To erect and maintain an adjoining fence. *Bronson v. Coffin*, 108 Mass. 175 (11 Am. Rep. 335). To insure buildings when the money is to be used to rebuild. *Thomas' Adm'rs v. Von Kapff's Ex'rs*, 6 Gill & J. 372. The cases, it will be seen, are as various as the particular covenants upon which they are

based. Likewise in the future each particular case must be determined by itself, by the application of the principle declared by common law or by statutes, where they exist."

The right to recover damages arising from a breach of covenant of warranty does not run with the land. *Wesco v. Kern*, 36 Or. 433 (59 Pac. Rep. 548). The duty of trustees to keep in repair bridges across the Wabash & Erie canal, imposed by Ind. Laws 1847, p. 33, granting to them the Wabash & Erie canal and its feeder lands with power to sell the property, does not become a covenant running with the land and enforceable against their grantees. *Ft. Wayne Water-Power Co. v. Board of Com'rs*, 24 Ind. App. 514 (57 N. E. Rep. 146). For distinction between a conditional limitation in a conveyance of land and a covenant running with the land, see *Atlanta Consol. St. Ry. Co. v. Jackson*, 108 Ga. 634 (34 S. E. Rep. 184).

**Sec. 94. Covenants of warranty.** A covenant of general warranty guarantees title, not quantity. *Burbridge v. Sadler*, 46 W. Va. 39 (32 S. E. Rep. 1028). Under Ga. Civ. Code, §§ 3614, 3615, a general covenant of warranty in a deed covers all defects in the title, though they may be known to the grantee. *Godwin v. Maxwell*, 106 Ga. 194 (32 S. E. Rep. 114). The right of a covenantee who has been evicted from a portion of the land embraced in his deed to sue for breach of his grantor's covenant of warranty is not affected by the fact that he had executed a mortgage to secure the purchase price, under foreclosure of which the remainder of the land afterward was sold. *Wesco v. Kern*, 36 Or. 433 (59 Pac. Rep. 548). A grantee in a deed with a covenant of warranty cannot recover on such covenant on account of his purchase of an outstanding title at a time when he was not compelled to purchase such outstanding title to protect any interest or title held by him. *Mumford v. Keet*, 154 Mo. 36 (55 S. W. Rep. 271). An indemnity mortgage taken by a grantee of land from his grantor on other land of the latter to secure against a claim as to a part of the land conveyed known to exist in favor of a third person, will pass to a subsequent grantee to whom he conveys the land by warranty deed, and the grantee to whom the mortgage was executed may be re-

strained from releasing it. *Rowe v. Hamburger*, 154 Ind. 604 (57 N. E. Rep. 534).

**Sec. 95. Covenants against incumbrances.** In case of a breach of a covenant against incumbrances, the covenantee may pay off the incumbrance and recoup the sum so paid against the amount due on the purchase price, or he may defeat an action for the recovery of the purchase price until such incumbrance be removed. *Warren v. Stoddart*, Ida. (59 Pac. Rep. 540). A covenant against incumbrances does not authorize the covenantee to pay back taxes, the lien for which has been lost by laches, where no eviction is threatened. *Robinson v. Bierce*, 102 Tenn. 428 (52 S. W. Rep. 992; 47 L. R. A. 275).

**Sec. 96. Breach of covenants.** A covenant of seizin is not broken by an outstanding inchoate right of dower, since such a right does not affect such grantee's possession of the land or his legal title thereto. *Building, Light & Water Co. v. Fray*, 96 Va. 559 (32 S. E. Rep. 58). The surrender of possession without actual eviction imposes upon the grantee under covenants of warranty and against incumbrances the burden of showing that he surrendered to a paramount title, in order to recover on his warranties. *Robinson v. Bierce*, 102 Tenn. 428 (52 S. W. Rep. 992; 47 L. R. A. 275). In the case of *Poley v. Lacert*, 35 Or. 166 (58 Pac. Rep. 37), the supreme court of Oregon say: "A covenant purporting to assure the purchaser from disturbance on the part of the grantor, 'or any person or persons whomsoever,' is not broken by the tortious disturbances of third parties. *Playter v. Cunningham*, 21 Cal. 229; *Meeks v. Bowerman*, 1 Daly, 99; *Spear v. Allison*, 20 Pa. St. 200; *Kelly v. Dutch Church*, 2 Hill, 105; *Greenby v. Wilcocks*, 2 Johns. 1 (3 Am. Dec. 379); *Brick v. Coster*, 4 Watts & S. 494. But it is otherwise where such acts are committed by the covenantor, or by his agents or servants while acting under his direction. *Levitzky v. Canning Co.* 33 Cal. 299; *O'Keefe v. Kennedy*, 3 Cush. 325; *Sedgwick v. Hollenback*, 7 Johns. 376."

**Sec. 97. Breach of covenants—Pleading and practice.**

A judgment rendered against a vendee of a water power in an action for damages brought by him against a third person for diverting the waters of the stream is not admissible in a subsequent action brought by him against his vendor for a breach of warranty, where the latter was not a party to the action in which the judgment was rendered. *Poley v. Lacert*, 35 Or. 166 (58 Pac. Rep. 37). A covenantee, who, by notice to the remote grantor and warrantor, has caused him to defend against an action brought to oust such covenantee, cannot dismiss an appeal from a decision adverse to him. *Ladd v. Kuhn*, 154 Ind. 313 (56 N. E. Rep. 671).

**Sec. 98. Breach of covenants—Measure of damages.**

Where there is a partial eviction by reason of a failure of title to a portion only of the premises conveyed, the measure of damages is the proportionate part of the purchase price, with interest. *McNally v. White*, 154 Ind. 163 (54 N. E. Rep. 794). Only nominal damages can be recovered from a covenantor on account of a breach of his covenant of seizin, where, before the covenantee has sustained any injury, the paramount title is perfected in the covenantor and passes to his covenantee by virtue of other covenants in the conveyance. *Building, Light & Water Co. v. Fray*, 96 Va. 559 (32 S. E. Rep. 58). Costs and attorney's fees can only be recovered against the grantor who has conveyed lands under covenants of general warranty, when they have been paid by the grantee, in a suit to obtain possession which has not been actually given by the grantor, or, if given, he defends against the suit of the true owner. *Jewett v. Fisher*, 9 Kan. App. 630 (58 Pac. Rep. 1023). A covenantee in a covenant of warranty who has been dispossessed by an action against him may recover from his covenantor the costs, and abstract and attorney's fees necessarily expended by him in resisting the action, where his covenantor had notice of it. *Alexander v. Staley*, 110 Ia. 607 (81 N. W. Rep. 803); *Hazlett v. Woodruff*, 150 Mo. 534 (51 S. W. Rep. 1048). Where the successful claimant of property, conveyed by a deed containing a covenant of warranty, enters upon and takes possession of it, and the covenantee is forced to bring an action to test the title he should be allowed to recover his costs, including a reason-

able attorney fee, in a subsequent action by him for a breach of the covenant. *Louisville Public Warehouse Co. v. James*, Ky. (56 S. W. Rep. 19; 21 Ky. Law Rep. 1726).

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## CROPS AND EMBLEMENTS

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### EPITOME OF CASES.

**Sec. 99. Right of one lawfully in possession to harvest crops—Volunteer crops.** As between one claiming land under an executory contract of purchase and a third party lawfully in possession thereof who has harvested crops during his possession, such crops belong to the latter, although they were volunteer crops and he had been warned by the purchaser that he claimed the crops growing on the land. *Churchill v. Ackerman*, 22 Wash. 227 (60 Pac. Rep. 406). The court say: "That the title to crops follows actual possession, and not a right to possession merely, is well established; and that when a person in adverse possession severs crops before recovery, the title thereto is in the former, is equally well established. In *Stockwell v. Phelps*, 34 N. Y. 363 (90 Am. Dec. 710), it was held that when a party in possession of land, claiming adversely to all others, sells to a third party the hay cut therefrom during such occupancy, the legal title thereto passes to his vendee, as against the party claiming title to said premises, although not in possession. See, also, *Brothers v. Hurdle*, 10 Iredell's Lew. 74 (51 Am. Dec. 400); *Dollar v. Roddenberry*, 97 Ga. 148 (25 S. E. Rep. 410); *Hinton v. Walston*, 115 N. C. 7 (20 S. E. Rep. 164). In *Page v. Fowler*, 39 Cal. 412 (2 Am. Rep. 462), it is held that, while the owner might recover for use and occupation, he could in no case be held to be the owner of the crops grown and actually harvested on the land by the defendant while in possession. The facts in this case are in principle identical with the facts in the case at bar. In that case it is said: 'It is undoubtedly true

that at common law a person who had been ousted from land might, after a recovery and re-entry, maintain his action of trespass for the mesne profits and for waste, for the reason that, after re-entry, the law supposes he has always been seized, and the acts of the defendant were a continuous trespass upon the rightful possession of the plaintiff; but no case has been cited in which this principle has been held to make the owner of the land out of possession under such circumstances the owner of the crops grown and actually harvested by the defendant. The very fact that he may recover the rents and profits of the land shows that he cannot recover the crops; for, as well said in the case of *Stockwell v. Phelps*, 34 N. Y. 363 (90 Am. Dec. 710), "the owner of the land, in such cases, does not recover the value of the crops raised and harvested, but the value of the use and occupation of the land, and the annual crops of grain and grass, which contain both the value of the use of the land and the labor of the farmer, do not, under such circumstances, belong to the owner of the land. It would be an oppressive rule to require every one who, after years of litigation, perhaps, may be found to have a bad title, to pay the gross value of all the crops he has raised." To the same effect is *Johnston v. Fish*, 105 Cal. 420 (38 Pac. Rep. 979), where the rule is laid down that the doctrine applied to volunteer crops, as well as to crops seeded the same year in which they were gathered."

**Sec. 100. Title and right to growing crops—Landlord and tenant.** The right of a tenant for years to the full possession and use of the premises until the expiration of his tenancy includes the right to remove before that time immature crops planted by him and growing on the premises. *Piper v. Piper*, 122 Mich. 662 (81 N. W. Rep. 554). The title and interest of a tenant in grain produced by him upon the land cultivated under a written lease from the owner of the land, which has not been abrogated or suspended, are to be determined by the terms of the lease. *Clendening v. Hawk*, 8 N. Dak. 419 (79 N. W. Rep. 878). Applying the rule that, as between landlord and tenant, growing crops are personal property, it is held that a judgment for the plaintiff in an action to recover possession by a landlord against his tenant, rendered in pursuance of an agreement

between them in which it was stipulated that no writ should be issued until an agreed date, subsequent to the judgment, does not entitle the landlord to growing crops, where the right or title to them was not litigated in the action. *Burket v. Miller*, 25 Ind. App. 110 (55 N. E. Rep. 500).

**Sec. 101. Title to growing crops—Rights of purchaser at foreclosure sale.** A purchaser of land at a foreclosure sale acquires title to the crops growing thereon, at the time of the sale, unless expressly reserved; and this right cannot be defeated by a prior sale or mortgage of the crops by the mortgagor of the land, when there has been no actual severance of the crops before the foreclosure sale. *Wootton v. White*, 90 Md. 64 (44 Atl. Rep. 1026; 78 Am. St. Rep. 425), citing and reviewing numerous authorities; *Jones v. Adams*, 37 Or. 473 (59 Pac. Rep. 811; 50 L. R. A. 388). In the last case the court say: "The general rule of the common law is that growing crops form a part of the real estate to which they are attached, and follow the title thereto. They are, however, for many purposes, regarded as personal property, and subject to voluntary sale or mortgage by the owner (*Reed*, Stat. Frauds, § 708); but the right of a purchaser or mortgagee is subject to the contingency that it may be wiped out by a foreclosure and sale under a mortgage given by the vendor or mortgagor on the land before the crop was sown, unless it is severed from the soil prior to such sale. *Sherman v. Willett*, 42 N. Y. 146. A real-estate mortgage is not only a lien upon the land, but also upon the annual crops growing thereon, unless they belong to a tenant, subject only to the right of severance prior to the sale and entry under the mortgage. *I Jones*, Mortg. § 697; *Rankin v. Kinsey*, 7 Ill. App. 215. Unless there is an actual severance, the crops pass with the title to the soil to which they are attached as against the mortgagor, and a previous sale or mortgage by him will not constitute a severance as against a purchaser at the foreclosure sale. The test is whether there has been an actual severance. If so, the crops become personal property, and do not pass to him who purchases the land subsequent to the severance; if not, they go with the land. *Anderson v. Strauss*, 98 Ill. 485; *Shepard v. Philbrick*, 2 Denio, 172; *Crews v. Pendleton*, 1 Leigh, 279 (19 Am. Dec.

750, and note); *Beckman v. Sikes*, 35 Kan. 120 (10 Pac. Rep. 592); *Gillett v. Balcom*, 6 Barb. 370." In Kansas it is held that a purchaser at a foreclosure sale of mortgaged premises is entitled to crops growing on the land at the time of the sale, as against the tenant of the mortgagor who took a lease on the land after default in the mortgage, and also as against the mortgagee of the tenant, whether either the tenant or his mortgagee were made parties to the proceedings in foreclosure or not. *Rardin v. Baldwin*, 9 Kan. App. 516 (60 Pac. Rep. 1097).

**Sec. 102. Mortgaging crops.** A mortgage may be given on crops to be raised in the future, *Wilkerson v. Thorp*, 128 Cal. 221 (60 Pac. Rep. 679); but, such a mortgage does not attach until the crops come into existence and are acquired by the mortgager, *McMaster v. Emerson*, 109 Ia. 284 (80 N. W. Rep. 389). One having an equitable title to land which gives him the right to the possession thereof has a sufficient title to the land to support a chattel mortgage on the crops. *Fields v. Karter*, 121 Ala. 329 (25 So. Rep. 800). A tenant's mortgage on ungrown crops passes no title to his mortgagee, where, under his contract with his landlord it is stipulated that the ownership and possession of the crops are to remain in the latter, who is entitled to hold them as a security for and have a deduction of all indebtedness due him for advances before division, and the tenant fails subsequently to request any division of the crop. *Savings Bank v. Canfield*, 12 S. Dak. 330 (81 N. W. Rep. 630). The object of N. Dak. Rev. Codes, § 4681 is to prevent taking mortgages on crops to be grown for an indefinite number of years; and it was not intended to avoid a mortgage of the crop for the existing year, whether matured or not. *Schweinber v. Great Western Elevator Co.*, 9 N. Dak. 113 (81 N. W. Rep. 35). A purchaser of mortgaged crops with notice of the mortgage takes subject to it. *Meyer v. Davenport Elevator Co.*, 12 S. Dak. 172 (80 N. W. Rep. 189).

**Sec. 103. Execution sale of growing crops.** An immature crop of growing wheat raised under a lease binding the tenant properly to care for and harvest the wheat and deliver to his landlord a portion thereof as rent, cannot be



sold on an execution against the tenant, the life of which will expire before the crop is ripe for harvest. *Tipton v. Martzell*, 21 Wash. 273 (57 Pac. Rep. 806; 75 Am. St. Rep. 838). But a growing crop of peaches is *fructus industriales* and subject to levy on execution; and in the levy of an execution on such a crop, a proper notification to the party and indorsement on the return are sufficient, without manual possession by the officer. *State v. Fowler*, 88 Md. 601 (42 Atl. Rep. 201; 42 L. R. A. 849; 71 Am. St. Rep. 452). The court say: "It was argued in behalf of the appellees that a growing crop of peaches is not the subject of a levy under an execution, and that in levying thereon the sheriff was a trespasser, and the case was thus brought within the principle ruled on in *State v. Brown*, 54 Md. 322. But this cannot avail the defendants. It was expressly held in *Purmer v. Piercy*, 40 Md. 223 (17 Am. Rep. 591), 'that a growing crop of peaches or other fruit requiring periodical expense, industry, and attention, in its yield and production may well be classed as *fructus industriales*, and not subject to the fourth section of the statute of frauds'; and it is settled upon satisfactory authority that *fructus industriales* may be taken in execution and sold. The trees or plants are *fructus naturales*; the fruits are *fructus industriales*. 8 Am. & Eng. Enc. Law (2nd Ed.) 313; *Penhallow v. Dwight*, 7 Mass. 34 (5 Am. Dec. 21); *Stambaugh v. Yeates*, 2 Rawle, 161; *Craddock v. Riddlesbarger*, 2 Dana, 207.

It was also contended that, even if subject to levy, no valid levy was in fact made; but, in levying upon growing crops, manual possession, concurrent with the making of the levy, is impossible, and it is held that proper notification to the party and indorsement on the levy is all that is necessary. 8 Am. & Eng. Law (2nd Ed.) 310; *Barr v. Cannon*, 69 Ia. 20 (28 N. W. Rep. 413)."

**Sec. 104. Miscellaneous notes.** The measure of damages for the destruction of growing crops is their value at the time the loss occurred, to be determined by the facts then existing. *Burnett v. Great Northern Ry. Co.*, 76 Minn. 461 (79 N. W. Rep. 523). A sale of growing corn by a debtor to his creditor under a contract by which the former agrees to gather it, haul it to his vendee's mill, where it is to be weighed, and when the amount is ascer-

tained he is to receive credit on his debt, does not pass title until the corn has been gathered, weighed and delivered. *Parman v. Marshall*, Tenn. (51 S. W. Rep. 116). Under Minn. Gen. Stat., § 5854, the owners of crops which they have sown upon lands occupied by them may enter upon the premises for the purpose of removing the crops after entry of judgment against them in ejectment, although such owners were adjudged to be not entitled to possession of the land when the crops were sown. *Bloomendahl v. Albrecht*, 79 Minn. 304 (82 N. W. Rep. 585).

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## CURTESY AND DOWER

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### EPITOME OF CASES.

**Sec. 105. Curtesy of husband.** The right of a husband to have an estate by curtesy is determined by the law in force at the time of his wife's death. *Alderson's Adm'r v. Alderson*, 46 W. Va. 242 (33 S. E. Rep. 228). Curtesy cannot be claimed in an estate in remainder held by the wife where she dies before the expiration of the particular estate. *Cox v. Boyce*, 152 Mo. 576 (54 S. W. Rep. 467; 75 Am. St. Rep. 483). The proceeds of a sale of an estate by curtesy belong to the owner of such estate, and the owner of the fee has no right thereto. *Wear & Booger Dry-Goods Co. v. Smith*, 66 Ark. 609 (49 S. W. Rep. 493). A husband's "curtesy initiate" in his wife's separate estate does not entitle him to the rents and profits thereof during coverture. *Woodward v. Woodward*, 148 Mo. 241 (49 S. W. Rep. 1001). A wife occupying with her husband public lands under the donation law (Act Cong., Sept. 27, 1850), who dies prior to the completion of the four years residence and occupation required by the statute, has no such estate of inheritance in the land as will give him a right to estate by curtesy in her half, although after the completion of the four years a patent was

issued for one-half of the claim to her and her heirs. *Quinn v. Ladd*, 37 Or. 261 (59 Pac. Rep. 457). In Virginia it is held that a husband has not an estate as tenant by the curtesy in land conveyed by him in such manner as to create an equitable separate estate in his wife, whether the conveyance be made directly to her, or to another person for her, in the absence of a reservation in the conveyance of his right thereto at her death. *Jones v. Jones' Ex'r*, 96 Va. 749 (32 S. E. Rep. 463). An agreement between a husband and wife to live separate, containing a stipulation releasing the husband's right to curtesy in his wife's lands, may be asserted as a bar to a subsequent action by him to enforce such right, where there has been a complete performance of the agreement of separation, although it was not enforceable at law as such. *McBreen v. McBreen*, 154 Mo. 323 (55 S. W. Rep. 463; 77 Am. St. Rep. 758). A husband's right to curtesy is not destroyed by W. Va. Laws 1893, chs. 3, 43, defining the rights and powers of a married woman as to her separate estate. *Alderson's Adm'r v. Alderson*, 46 W. Va. 242 (33 S. E. Rep. 228).

**Sec. 106. Curtesy of husband—Defeat of by stipulation in deed of separate estate to wife.** A husband cannot claim an estate by curtesy in land conveyed to his wife for her sole and separate use, "free and clear of any and all marital rights of her present or any husband she may have hereafter." *McBreen v. McBreen*, 154 Mo. 323 (55 S. W. Rep. 463; 77 Am. St. Rep. 758). The court say: "Indeed, it is the prevailing doctrine in England and the United States that it is not competent at common law, in a grant to a woman of an estate of inheritance, to exclude her husband from his right of curtesy; but it is equally well settled that in equity an estate may be so limited as to give the wife the inheritance, and by words clearly denoting that intention to exclude and deprive the husband of curtesy. *Tied. Real Prop.* (2nd Ed.), § 105; 1 *Washb. Real Prop.* (5th Ed.), §15, p. 176; *McTigue v. McTigue*, 116 Mo. 138 (22 S. W. Rep. 501); *Grimball v. Patton*, 70 Ala. 635; *Rigler v. Cloud*, 14 Pa. St. 361; *Pool v. Blakie*, 53 Ill. 495; *Haight v. Hall*, 74 Wis. 152 (42 N. W. Rep. 109; 17 Am. St. Rep. 122). It is agreed that the words of exclusion must clearly indicate an intention to de-

prive the husband of curtesy. *Steadman v. Palling*, 3 Atk. 423; *Morgan v. Morgan*, 5 Madd. 410; *Mullany v. Mullany*, 4 N. J. Eq. 16 (31 Am. Dec. 238); *Dubs v. Dubs*, 31 Pa. St. 149. With the law thus settled, let us recur now to the deed under which plaintiff asserts a right to curtesy in his wife's land. The granting clause is, 'to her sole and separate use, free and clear of any and all marital rights of her present or any husband she may have hereafter.' Now, it is clear that curtesy is a marital right. It is an estate conferred by the law, not by grant, as an incident of marriage. No right growing out of marriage can better be denominated a marital right."

**Sec. 107. Right of dower—Nature of estate—Sale and conveyance of.** A wife's dower right in her husband's land is subject to claims for the purchase price thereof. *Frederick v. Emig*, 186 Ill. 319 (57 N. E. Rep. 883; 78 Am. St. Rep. 283); *Building, Light and Water Co. v. Fray*, 96 Va. 559 (32 S. E. Rep. 58). Before the death of the husband, and while the right of dower is in the inchoate stage, it is subject to legislative control and may be enlarged, diminished, altered or abolished. *Hatch v. Small*, 61 Kan. 242 (59 Pac. Rep. 262). A wife's inchoate right of dower in lands held by her husband jointly with another is subject to partition of the land, and she takes her dower in the part which is assigned to her husband. *Napper v. Mutual Life Ins. Co.*, Ky. (53 S. W. Rep. 28; 21 Ky. Law Rep. 791). Citing, *Potter v. Wheeler*, 13 Mass. 504; *Lloyd v. Conover*, 25 N. J. L. 51; *Wilkinson v. Parish*, 3 Paige, 658. Conn. Gen. Stat., § 618, giving the right of dower to "every woman living with her husband at the time of her death, \* \* \* or who has been divorced without alimony where she is the innocent party," does not give dower to a woman divorced from her husband by his fault, and married again, when he is also married again and was living with the subsequent wife at the time of his death. *Appeal of Brown*, 72 Conn. 148 (44 Atl. Rep. 22; 49 L. R. A. 144). In Illinois it is held that a surviving husband or wife cannot sell or convey the right of dower and homestead or lease the same to a person other than the owner of the fee, before the same has been set off and assigned. *Lewis v. King*, 180 Ill. 259 (54 N. E. Rep. 330). A decree establishing that a widow's conveyance of her unassigned dower interest in lands was made to secure her debt cannot be enforced

by an execution sale of the property until the dower is assigned. *Baer v. Ballingal*, 37 Or. 416 (61 Pac. Rep. 852).

**Sec. 108. Lands subject to dower.** Dower cannot be claimed in an estate by the entirety, *Roulston v. Hall*, 66 Ark. 305 (50 S. W. Rep. 690; 74 Am. St. Rep. 97); nor in a vested remainder held by a husband where he died before the life tenant, *Hill v. Pike*, 174 Mass. 582 (55 N. E. Rep. 324). In the absence of a statute a divorced woman cannot have dower in lands owned by her former husband during the marriage. *Allen v. Austin*, 21 R. I. 254 (43 Atl. Rep. 69). Under Mo. Rev. Stat. 1889, § 4513, a wife acquires no right to dower in lands held by her husband as trustee. *Miller v. Miller*, 148 Mo. 113 (49 S. W. Rep. 852). A widow cannot claim dower in partnership lands in which her husband held an interest and which were sold during the existence of the partnership and the proceeds turned in to the firm. *Welch v. McKenzie*, 66 Ark. 251 (50 S. W. Rep. 505). Under Mich. Comp. Laws 1893, § 8918, giving a widow dower in the lands whereof her husband was seized by an estate of inheritance at any time during the marriage, the wife of a contract purchaser who has no legal title is not entitled to dower. *Stephens v. Leonard*, 122 Mich. 125 (80 N. W. Rep. 1002).

**Sec. 109. Release or loss of dower.** A widow's right to dower may be barred by an adverse possession of the land for the prescriptive period by one who does not claim under the husband. *Brown v. Morrissey*, 124 N. C. 292 (32 S. E. Rep. 687). A conveyance by a husband when ignorant of his wife having any interest in the land will not operate to release his right of dower. *Farrand v. Long*, 184 Ill. 100 (56 N. E. Rep. 313). A husband who joins with his wife in a conveyance of her real estate merely for the purpose of releasing his dower is not liable upon the covenants contained in the deed. *Center v. Elgin City Banking Co.*, 185 Ill. 534 (57 N. E. Rep. 439). A wife cannot have dower in land which her husband has conveyed in exchange for other property, out of the proceeds of which she has received upon his death an amount exceeding the value of her dower in the land conveyed. *Crow v. Brown*, Ky. (56 S. W. Rep. 805). The setting apart to an execution debtor and his wife of a homestead in land levied upon does not preclude her re-

covering dower in the residue after his death. *Kincaid v. Wilson*, Ky. (49 S. W. Rep. 333; 20 Ky. Law Rep. 1364). A contract between husband and wife made with the intention of promoting a dissolution of the marriage relation existing between them, is contrary to public policy, illegal and void, and will not, after the husband's death, bar the widow's right to a year's support and dower. *Birch v. Anthony*, 109 Ga. 349 (34 S. E. Rep. 561; 77 Am. St. Rep. 378). Under the statutes of Arkansas, a wife cannot relinquish her dower rights in her husband's real property by agreement in a contract of separation to accept a certain annuity in full satisfaction and release of all dower rights. *Bowers v. Hutchinson*, 67 Ark. 15 (53 S. W. Rep. 399). Under Mo. Rev. Stat. 1889, § 4525, a wife's acceptance of a conveyance of land to her in fee by her husband does not operate as a relinquishment of her dower in his lands, where there is no provision in the deed that it is in lieu of dower in other lands. *Bealey v. Blake*, 153 Mo. 657 (55 S. W. Rep. 288).

Kan. Comp. Laws 1862, ch. 83, par. 9, providing that "if the husband be divorced from the wife for her fault or misconduct, she shall not be endowed," operates to bar the dower claim of such a divorced wife in lands conveyed by her husband without her joinder before decree of divorce. *Hatch v. Small*, 61 Kan. 242 (59 Pac. Rep. 262). Ohio Rev. Stat., § 5699, preserving the right of dower to a wife divorced by her husband's fault is enabling in its character, and does not create a disability nor impose any restraint on the power of the wife to relinquish such dower right, when the divorce is granted, or at any time thereafter. *Julier v. Julier*, 62 O. St. 90 (56 N. E. Rep. 661; 78 Am. St. Rep. 697). Del. Rev. Code, ch. 87, § 9, construed and applied—loss of wife's dower by her adultery. *McGrenra v. McGrenra*, 7 Del. Ch. 432 (44 Atl. Rep. 816). S. C. Rev. Stat. 1893, § 1903 (13 Edw. I, ch. 34), providing that if a wife willingly leave her husband and go away and continue with her advouter she shall be barred of her dower, does not bar the right of a wife to claim dower who has been deserted by her husband, where she made unsuccessful efforts to win him back before going to live in adultery. *Beaty v. Richardson*, 56 S. C. 173 (34 S. E. Rep. 73; 46 L. R. A. 517). Citing, *Reel v. Elder*, 62 Pa. St. 308 (1 Am. Rep. 414).

**Sec. 110. Release of dower by conveyance in fraud of creditors.** A duly executed conveyance made in fraud of one's creditors, being binding upon him, will bar the right of a subsequent wife to claim dower in the land conveyed. *Adkins v. Adkins*, Tenn. (52 S. W. Rep. 728). A wife joining in the execution of a conveyance of her husband's land made to defraud his creditors is not barred thereby from claiming dower in the land, upon the conveyance being set aside, where she did not participate in the fraud and received no consideration for signing the deed. *Frederick v. Emig*, 186 Ill. 319 (57 N. E. Rep. 883; 78 Am. St. Rep. 283); *Wells v. Estes*, 154 Mo. 291 (55 S. W. Rep. 255); *Bealey v. Blake*, 153 Mo. 657 (55 S. W. Rep. 288). In the last case the court say: "It is, however, contended that Mrs. Blake expressly waived her dower in the land in suit by joining with her husband in the deed to Gilbert Blake, and that, notwithstanding that deed was afterward set aside as to her husband, still it was a good conveyance as to her, for she was not insane or unduly influenced. This is not tenable. The relinquishment of the dower by the wife was the incident, and the conveyance of the husband's title was the main purpose of the deed to Gilbert Blake. When a wife joins a husband in a deed to his land, and relinquishes her dower, it is implied thereby that a portion of the consideration named in the deed or actually paid represented the value of her dower interest. In this case no consideration passed to any one for the conveyance to Gilbert Blake. It was wholly a voluntary conveyance, and has been set aside and vacated as to the husband, as herein stated. When it was set aside as to the husband, it was thereby also annulled as to the wife. In *Bohannon v. Combs*, 97 Mo. 448 (11 S. W. Rep. 232; 10 Am. St. Rep. 328), *Sherwood, J.*, speaking for the court, said: 'Although there are authorities to the contrary, the better opinion is that when a conveyance of the husband, in which the wife joins, is set aside as being fraudulent as to creditors [and the same is true if fraudulent as to his heirs], this will result in reviving the wife's right of dower; for that, the deed of the husband being void, there is no estate left in the grantee upon which the relinquishment of dower can operate; hence the wife is restored to her former rights. *Robinson v. Bates*, 3 Metc. (Mass.) 40; *Malloney v. Horan*, 49 N. Y. 111 (10 Am. Rep. 335); *Dugan v. Massey*, 6 Bush. 81; *Blanton v.*

Taylor, Gilmer, 209; Belford v. Crane, 16 N. J. Eq. 265; Wyman v. Fox, 59 Me. 100; Stinson v. Sumner, 9 Mass. 143 (6 Am. Dec. 49); Humes v. Scruggs, 64 Ala. 40; Richardson v. Wyman, 62 Me. 280 (16 Am. Rep. 459); Hinchliffe v. Shea, 103 N. Y. 153 (8 N. E. Rep. 477); Summers v. Babb, 13 Ill. 483; Woodworth v. Paige, 5 O. St. 70. The doctrine announced and supported by the foregoing authorities has received the approval of an eminent author. 1 Washb. Real Prop. (5th Ed.) 261."

**Sec. 111. Jointure.** Construing and applying Ind. Rev. Stat. 1894, §§ 2661, 2663, 2665 (Rev. Stat. 1901, §§ 2661, 2663, 2665), it is held that a wife to whom land has been conveyed as a jointure has one year after the death of her husband in which she may elect whether she will take such jointure or the interest given her by law in the lands of her deceased husband, whether she signified her assent in writing to such jointure at the time of its execution or not, as required by § 2661; but when she elects to take such jointure after the death of her husband she cannot also receive the interest in his estate given her by law, and this is true regardless of the value of the property conveyed to her by the jointure. Mannan v. Mannan, 154 Ind. 9 (55 N. E. Rep. 855).

**Sec. 112. Assignment of dower.** Dower may be assigned in partition proceedings. Davis v. Patty, 76 Miss. 753 (25 So. Rep. 662). Adult heirs of a decedent may agree with one having a right of dower in the estate that he shall receive one-third of the rents in lieu of dower. Sill v. Sill, 185 Ill. 594 (57 N. E. Rep. 812). An assignment of dower by parol agreement made and entered into between the owner of the fee and the dowress is valid, although by it the widow is given the use for life of the entire premises in which she is dowerable. Pearce v. Pearce, 184 Ill. 289 (56 N. E. Rep. 311). A provision in a decree assigning dower to a husband in the estate of his deceased wife, which gives him damages for the detention of the property from a time prior to the filing of his petition, cannot be sustained where there is no recital or evidence in the record of a demand by him for an assignment, or the date of it, or what damages, if any, there were. Gogan v. Burdick, 182 Ill. 126 (55 N. E. Rep. 126).



In an action by a widow to recover dower in lands sold to satisfy a mortgage, she is entitled to recover one-third of the reasonable rental value of the property from the institution of suit, less her proportion of taxes, insurance and necessary repairs. *Anderson v. Fitzpatrick*, Ky. (49 S. W. Rep. 786; 20 Ky. Law Rep. 1617). The death of a widow after judgment dismissing her petition to recover dower and rents does not bar a reversal of the judgment by her personal representative, as to the rents. *Kincaid v. Wilson*, Ky. (49 S. W. Rep. 333; 20 Ky. Law Rep. 1364). For a discussion of the subject of jurisdiction of courts of equity in assigning dower, see *Baer v. Ballingal*, 37 Or. 416 (61 Pac. Rep. 852); *Ballards' Law Real Property*, Vol. VII, § 104.

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## DANGEROUS PREMISES

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### CAPEN v. HALL.

(21 R. I. 364.)

**Duty of landlord to third persons—Lighting halls and stairways in business block.** The owner of a business block in which rooms and offices are let owes no duty, to a person injured while visiting tenants, to keep the hallways and stairways lighted, where they are in all respects inherently safe and convenient.

TILLINGHAST, J.

**Sec. 113. Statement of the case.** This is trespass on the case for negligence. The declaration alleges, in substance, that defendants had the care, control and management of a certain business block in Providence, in which they let room and apartments, stores and offices to various tenants, and that they extended an invitation, express or implied, to the public to make use of the entries, hallways and stairways in visiting said tenants. It also alleges that the plaintiff, while using the same, and while departing from a visit to one of

the tenants in said block, being in the exercise of due care, suddenly tripped and fell, owing to the insufficient light in said entries, hallways and stairways. The declaration further alleges that it was the duty of defendants to keep said entries, hallways and stairways lighted, so that a person using the same with due care should not be injured, and, more particularly, that it was the duty of defendants on the day in question to keep said entries, etc., lighted, so that plaintiff, who was then and there coming away from certain tea rooms in said block, after having been there for a lawful purpose, should not be injured. It then alleges the failure of the defendants to discharge said duty and the consequent injury to the plaintiff for which she sues. The defendants demur to the declaration on the ground that it is not the duty of defendants to keep said entries, hallways and stairways lighted. It is to be observed that the declaration does not allege that there was any structural defect of any sort in the entries, hallways or stairways of said building, or anything in the surroundings which called for special care on the part of the defendants, but only that said hallways, etc., were insufficiently lighted.

**Sec. 114. Duty of landlord to third persons—Lighting halls and stairways in business block.** The bald question raised, therefore, is whether it was the duty of the defendants, as a matter of law, to keep said entries and stairways lighted. If it was, it becomes the duty of all landlords and owners of buildings, who retain general control of the hallways and stairways thereof, to see that the same are properly lighted at all times when they may be rightfully used, notwithstanding they are in all respects inherently safe and convenient. We are inclined to the opinion that such a requirement would be unreasonable, and that the law does not impose so onerous a burden as this upon the owners of buildings. That they must so construct their buildings as to render them reasonably safe for the purposes for which they are permitted to be used—as to strangers, at any rate, who are rightfully upon the premises—is evidently a reasonable requirement, and one which the law devolves upon them. *Tayl. Landl. & Ten.* (8th Ed.), § 175; *Monteith v. Finkbeiner*, 66 Hun. 633 (21 N. Y. Supp. 288); *Alperin v. Earle*, 55 Hun, 211 (8 N. Y. Supp. 51); *Henkel v. Murr*, 31 Hun, 30; *Dollard v. Roberts*, 130 N. Y. 269 (29 N. E. Rep. 104; 14 L. R. A. 238); *Looney v. Mc-*

Lean, 129 Mass. 33 (37 Am. Rep. 295). As between landlord and tenant, however, where the latter has full control of the premises, the cases generally hold that the rule of caveat emptor applies. *Railton v. Taylor*, 20 R. I. 279 (38 Atl. Rep. 980; 39 L. R. A. 246); *Tayl. Landl. & Ten.* (8th Ed.), § 175; 1 *Thomp. Neg.* 323. But, when it comes to the furnishing of artificial light, we cannot say, as a general proposition, that they are called upon to furnish it. In cases of special danger from unusual construction, or by reason of traps and pitfalls, the rule might be otherwise. But, as to ordinary halls and stairways, we are not prepared to say that the owners of buildings owe any duty, in regard to lighting the same, to the persons who may use them. If a person sees fit to poke around in a strange and unlighted hallway, and comes in contact with some obstruction or falls down stairs, and is injured, he has little ground of complaint, as ordinary prudence would dictate greater precaution. If it is necessary to use the hallway or stairs, some means could readily be employed to avoid danger in so doing. Considerable attention appears to have been given to the general question under consideration by the courts of New York, and the settled law of the adjudged cases in that state is that the owner, lessee, or occupant of a building is under no legal obligation to maintain lights in the hallways. *Muller v. Minken*, 5 Misc. Rep. 444 (26 N. Y. Supp. 801), and cases cited. See, also, *Thomas, Neg.* 719. In support of the plaintiff's contention that the declaration states a valid cause of action, her counsel relies mainly upon the case of *Marwedel v. Cook*, 154 Mass. 235 (28 N. E. Rep. 140). We do not think the case is a full authority in support of the plaintiff's declaration. In the first place, it was not a decision rendered on demurrer to the declaration, but on a petition for new trial with all the facts before the court. And, in the second place, it appeared, among other things, that the stairs, which were partly unlighted, were constructed in a well, three sides of which were closed; that at the back of the well, which was about nine feet from the entrance or open side, the stairs turned and passed down on the third side of the well to the front or open side; and that the turn was made by six "winders" which were nearly triangular in form, being but four inches wide on the inside, where the hand rail was, and about two feet wide at the other end against the wall, where there was no rail. In

view of these facts the court held that the jury might well have found that the stairs were unsafe unless lighted, and that the construction of the building and stairway was such as to cut off the natural light, and render the stairway unsafe without artificial light. It is apparent; therefore, that the decision was based upon the peculiar facts of the case, and hence cannot be said to hold generally that it is the duty of landlords to light the hallways and stairways of their buildings. It is also to be observed that the decision, even thus limited, was rendered by a divided court. Whether we should follow it if the case before us was similar, we are not now called upon to decide. The demurrer is sustained, and the case remitted to the common pleas division for further proceedings.

**Note**—Ordinarily a landlord is under no general duty to keep the halls and stairways in the leased premises lighted, and where they are otherwise safe and convenient he is not liable for injuries resulting to a tenant or a third person on account of the lack of light. *Eyer v. Jordan*, 111 Mo. 424 (19 S. W. Rep. 1095); *Hilsenbeck v. Guhring*, 131 N. Y. 674 (20 N. E. Rep. 580); *Gleason v. Boehm*, 58 N. J. L. 475 (34 Atl. Rep. 886; 32 L. R. A. 645); *Muller v. Menken*, 5 Misc. Rep. 444 (26 N. Y. Supp. 801); *Brugher v. Buchtenkirch*, 29 App. Div. 342 (51 N. Y. Supp. 464); but in the last case the court say: "There are, however, exceptions to this general rule, growing out of some unusual construction of hallways or passageways which, in order to render them reasonably safe to persons lawfully using them, need to be lighted. Thus, where the flooring of the passageway is uneven, or arranged with steps or an opening such as an elevator shaft, so situated as to be cut off from the natural light of day, by reason of which darkness their presence cannot be known, failure on the part of the landlord to supply artificial light is negligence." As sustaining this exception the court refers to *Sunderlin v. Hollister*, 4 App. Div. 478 (38 N. Y. Supp. 682); *Marwedel v. Cook*, 154 Mass. 235 (28 N. E. Rep. 140).

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## EPITOME OF CASES.

**Sec. 115. Liability of owner—General principles.**  
One using a dedicated way which, on account of the non-acceptance by the municipal authorities, constitutes a private

way, of the character of which he had notice, is a licensee and cannot recover against an abutting owner for injuries resulting to him from such use. *Moffatt v. Kenney*, 174 Mass. 311 (54 N. E. Rep. 850). The owner of a building owes no duty of protection against such accidents as might happen to one by reason of the unsafe and dangerous condition of a passageway therein, who came upon the premises by the invitation of a licensee who continued to use a room in the building after the termination of his license by its own expressed limitation. *Brehmer v. Lyman*, 71 Vt. 98 (42 Atl. Rep. 613). At common law the owner or occupant of a building owed no duty to keep it in a reasonably safe condition for members of a fire department who, in the exercise of their duties, might have occasion to enter the building; nor is this obligation imposed by Minn. Laws 1893, ch. 7, "An act for the protection of employees." *Hamilton v. Minneapolis Desk-Mfg. Co.*, 78 Minn. 3 (80 N. W. Rep. 693; 79 Am. St. Rep. 350). For an exhaustive collation of authorities as to the liability of the owner of premises of which he is not in possession, for injuries to others, see 46 L. R. A. 83-93.

**Sec. 116. Liability of owner for injury to servant.**

The rule of duty for a master to use reasonable care that the place of working of his servants shall be kept safe is not fully applicable in a case where the work itself involves the place of working. In such a case the duty extends only to the use of reasonable care to discover and give notice of latent danger. *Curley v. Hoff*, 62 N. J. L. 758 (42 Atl. Rep. 731). The owner of a building having a skylight in its roof is not liable for injuries to one whom he has directed to replace a glass therein caused by the latter negligently imposing too much of his weight on a mullion in the skylight. *Saunders v. Eastern Hydraulic Pressed-Brick Co.*, 63 N. J. L. 554 (44 Atl. Rep. 630; 76 Am. St. Rep. 222). The court says: "The rule of duty of the master applicable to the case admits of no doubt or dispute. He is bound to take reasonable care to have the place in which he directs his servant to work reasonably safe for the doing of that work, and free from latent, or concealed, dangers. *Electric Co. v. Kelly*, 57 N. J. Law, 100 (29 Atl. Rep. 427); *Comben v. Stone Co.*, 59 N. J. Law, 226 (36 Atl. Rep. 473). Had plaintiff received his injury by falling through the roof on which he was directed

to work, by reason of a defect in its construction, he might claim that defendant was liable for his injury; and a question for a jury would arise,—whether the master, in respect to the construction of the roof, had used the required care. Under such circumstances, the roof was a place furnished by the master for his servant to work upon. But the purpose of the mullion in this skylight was to aid in the support of the panes of glass. The master's duty was to have it so constructed as to reasonably answer that purpose, but it is impossible to discover any ground in reason for imposing upon the master any duty to have it so constructed as to bear the weight or any part of the weight of a servant, although engaged in repairing it. The duty of the master in this respect is like that of one who invites another to make use of some place or appliance, and is limited to the care requisite for the reasonable use thereof for the purposes for which it is designed. *Telephone Co. v. Speicher*, 59 N. J. L. 23 (39 Atl. Rep. 661; 60 N. J. L. 242 (41 Atl. Rep. 1116))."

**Sec. 117. Liability of owner for injury to tenant and family.** A landlord who has failed to keep his contract to make repairs is liable for all injuries resulting from such failure. *Mason v. Howes*, 122 Mich. 329 (81 N. W. Rep. 111). The rule of caveat emptor applies as between landlord and tenant. *Towne v. Thompson*, 68 N. H. 317 (44 Atl. Rep. 492; 46 L. R. A. 748). See *Ballards' Law Real Property*, Vol. VII, § 107. In the absence of fraud, concealment or covenant in the lease, a landlord is not liable to his tenant for an injury suffered by him during his occupancy by reason of the defective condition or faulty construction of the leased premises; and this rule is not changed by Cal. Civ. Code, §§ 1941, 1942, requiring the lessor of a building intended for the occupation of human beings, in the absence of an agreement to the contrary, to put it into a condition fit for such occupancy and so keep it, and which authorizes the tenant to vacate the premises or expend a month's rent for repairs in case of the landlord's failure to comply with the statute. *Gately v. Campbell*, 124 Cal. 520 (57 Pac. Rep. 567). A tenant, who, with knowledge of the dangerous condition of a stairway, continues to use it for more than a year, cannot recover for injury resulting to him on account of it, where he could have repaired the same at a trivial expense. *McGinn v. French*,

107 Wis. 54 (82 N. W. Rep. 724). A lessor without knowledge that the weight counterbalancing a door covering a cellar stairway on the premises had become detached, is not liable for injury to the 12-year-old daughter of the lessee resulting from her attempting to use the door with full knowledge of its condition. *Vorrath v. Burke*, 63 N. J. L. 188 (42 Atl. Rep. 838).

**Sec. 118. Liability of owner to guests of tenant—Negligent use of dangerous premises.** A landlord is not liable to the guest of his tenant for injuries received on account of the dangerous condition of the premises which existed at the time the lease was made and was plainly visible and was not the result of the lack of repair. *Roche v. Sawyer*, 176 Mass. 71 (57 N. E. Rep. 216). The lessor of a boarding house is not liable to the lessee's boarders for illness caused by the unsanitary condition of the premises, in the absence of any misrepresentation, concealment or wrongful failure of the lessor to disclose the defect, and when he has not made any contract to keep the premises in suitable condition. *Towne v. Thompson*, 68 N. H. 317 (44 Atl. Rep. 492; 46 L. R. A. 748). The fact that a building leased by the owner to another for hotel purposes has an outside opening on an upper floor which opens out into space, unprovided with guards, but which is provided with a shutter having necessary fastenings, does not make the lessor liable for injuries resulting to a guest of the lessee on account of the latter's failure to keep the shutter closed and properly fastened. *Texas Loan Agency v. Fleming*, 92 Tex. 458 (49 S. W. Rep. 1039; 44 L. R. A. 279). The court say: "It is said that the door opened out upon space, and was unprovided with bars and guards, and was therefore dangerous in itself. It is a matter of common knowledge that windows are constructed so that the opening comes down about as near to the floor as a door, with sash adjusted upon cords and rollers, by which they can be raised, and, when unsupplied with blinds, are as dangerous in themselves as the door in question. If the opening which caused the injury had been a window supplied with sash, instead of a door with a shutter, the danger would have been just as great as it was in the present instance, and the liability of the landlord would have been the same. There is not in the record any testimony that tends to show that the door in question

was unsafe when properly closed and secured; and, in fact, if any one had testified to such a proposition, it would be incredible, as being contrary to well known physical facts inconsistent with it. *Hudson v. Railroad Co.*, 145 N. Y. 412 (40 N. E. Rep. 8). The judgment in this case rests solely upon the proposition that the landlord is liable for the negligence of his tenant or other person who may, without authority from him, occupy the premises, and that the failure of such person to use the means which the landlord has furnished to make safe and secure the openings about the building renders the owner liable to the guests of such tenant for damages received by reason of that negligence. It is difficult to argue a proposition so palpably at variance with the well-settled principles of law which determine the liabilities of such parties. We have, however, carefully examined this question, and find that the authorities without exception, so far as we have been able to discover, are in direct opposition to any such claim of liability. The law is that when the landlord leases premises to another, and such premises are in a good and safe condition, he is not liable for any injury which may result by reason of the negligence of the tenant to make use of the means furnished him by which the premises may be maintained in safety for all persons using them. *Johnson v. McMillan*, 69 Mich. 36 (36 N. W. Rep. 803); *Adams v. Fletcher*, 17 R. I. 137 (20 Atl. Rep. 263; 33 Am. St. Rep. 859); *Mellen v. Morrill*, 126 Mass. 545 (30 Am. Rep. 695); *Leonard v. Storer*, 115 Mass. 86; *Handyside v. Powers*, 145 Mass. 123 (13 N. E. Rep. 462); *Kalis v. Shattuck*, 69 Cal. 593 (11 Pac. Rep. 346; 58 Am. Rep. 568); *White v. Montgomery*, 58 Ga. 204; *Allen v. Smith*, 76 Me. 335; *McCarthy v. Bank*, 74 Me. 315 (43 Am. Rep. 591); *Sargent v. Stark*, 12 N. H. 332; *Stewart v. Putnam*, 127 Mass. 403."

**Sec. 119. Liability of owner for injury from construction, fall, repair or removal of buildings—Acts of independent contractor.** An abutting owner is not liable for an injury to a passer-by occasioned by the negligence of a servant of an independent contractor in throwing a piece of lime into a mortar bed placed in the street for use by the contractor in erecting buildings for such owner. *Strauss v. City of Louisville*, Ky. (55 S. W. Rep. 1075). The only instances in which an employer of an independent contractor is liable



for the negligence of such contractor are those enumerated in Ga. Civ. Code, § 3819, and there being nothing in this section creating such liability, it is held that where the owner of a vacant city lot, who for many years has suffered the public to use a thoroughfare over the same, employs an independent contractor to construct a building thereon according to certain specifications, including excavations for piling for the foundation, and the contractor digs a trench for such purpose across the thoroughfare, the owner is not liable for a personal injury sustained by one who falls into the trench by reason of its unguarded condition. *Ridgeway v. Downing Co.*, 109 Ga. 591 (34 S. E. Rep. 1028). The owner of a building, which, on account of its negligent construction, constitutes a dangerous structure which is liable to fall of its own weight, who has knowledge of these facts, is liable for injuries resulting to a third person from its collapse, although the building at the time was in possession of a lessee and it is not shown to have been constructed by such owner. *Waterhouse v. Joseph Schlitz Brewing Co.*, 12 S. Dak. 397 (81 N. W. Rep. 725; 48 L. R. A. 157). A lessor in a lease of a house for three years with the right of an extension for two years, in which the lessee covenants to keep the buildings in repair, is not liable for injury to a passerby occurring three years after the letting, occasioned by a fall of a piece of stone from the cap stone of a window in the building. *Monroe v. Carlisle*, 176 Mass. 199 (57 N. E. Rep. 332). An owner of property, although he retains control of the premises, who employs a competent contractor to repair chimneys on the buildings thereon in whose hands the details of such work are placed, is not liable to a passerby injured by falling bricks caused by the contractor's negligence. *Boomer v. Wilbur*, 176 Mass. 482 (57 N. E. Rep. 1004). But where the owner of a building, the ruined walls of which, measurably destroyed by fire, are left standing, a menace to the public and the property of others in the vicinity and he is ordered by the inspector of buildings to take down the walls, he cannot escape liability for injury to the property of others arising from negligence in performing such work, by employing an independent contractor to do it for him for an agreed consideration, stipulating in the contract that the contractor should save him harmless from injuries to others in doing the work. *Covington & Cincinnati Bridge Co. v. Steinbrock*, 61 O. St. 215 (55 N. E.

Rep. 618; 76 Am. St. Rep. 375). The court say: "The weight of reason and authority is to the effect that, where a party is under a duty to the public or third person to see that work he is about to do, or have done, is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability in case it is negligently done to the injury of another. *Bower v. Peate*, 1 Q. B. Div. 321; *Tarry v. Ashton*, 1 Q. B. Div. 314; *Hughes v. Percival*, 8 App. Cas. 443; *Dalton v. Angus*, 6 App. Cas. 829; *Hole v. Railway Co.*, 6 Hurl. & N. 488; *Gray v. Pullen*, 5 Best & S. 970; *Hardaker v. Idle Dist.* [1896], 1 Q. B. 335; *Storrs v. City of Utica*, 17 N. Y. 104 (72 Am. Dec. 437); *Spence v. Shultz*, 103 Cal. 208 (37 Pac. Rep. 220); *Sturges v. Society*, 130 Mass. 414 (39 Am. Rep. 463); *Gorham v. Gross*, 125 Mass. 232 (28 Am. Rep. 234); *Mechem, Ag.*, §§ 747, 748; *Whart. Neg.*, § 185; *Wood, Mast. & Serv.*, § 316; *Shear. & R. Neg.*, § 176; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Penny v. Council* [1898], 2 Q. B. 212, 217; *Halliday v. Telephone Co.* [1899], 2 Q. B. 392; *Lawrence v. Shipman*, 39 Conn. 586, 589; *Stephenson v. Wallace*, 27 Grat. 77; *Water Co. v. Ware*, 16 Wall. 566 (21 L. Ed. 485); *Black v. Finance Co.* [1894], App. Cas. 48."

**Sec. 120. Liability of owner of pond or reservoir for injuries to children.** A city cannot be held liable for the drowning of a child while skating on the ice formed on a pond of water partly located on one of its streets and partly on private premises, where it does not appear that the accident happened upon that portion of the pond located on the street, *Arnold v. City of St. Louis*, 152 Mo. 173 (53 S. W. Rep. 900; 48 L. R. A. 291; 75 Am. St. Rep. 447); but in Nebraska it is held that a city is liable for the death of a child who was drowned in a pond of water situated in part on a public street and part on abutting lots, when it is shown that the accumulation of water was occasioned by the negligence of the city in filling in the street with earth, that no fence or barrier was erected, and that the child entered the pond from the street, *Bowman v. City of Omaha*, 59 Neb. 84 (80 N. W. Rep. 259), following *City of Omaha v. Richards*, 49 Neb. 244 (68 N. W. Rep. 528). The owner of an unfenced city lot near a public school building, upon which, without his knowledge, there had accumulated a pond of water caused by the obstruction

of a natural drain by the municipal authorities, is not liable for the death of a ten-year old school child drowned while playing on the pond, and to whom such owner has given neither an express nor implied invitation to enter upon his premises. *Cooper v. Overton*, 102 Tenn. 211 (52 S. W. Rep. 183; 45 L. R. A. 591; 73 Am. St. Rep. 864). See opinion for exhaustive review of conflicting authorities on the liability of owners of dangerous premises for injuries to children; also, *Ballards' Law Real Property*, Vols. VI, § 157; VII, § 109.

**Sec. 121. Excavations or openings in or near public ways.** Where the public has passed over private property for a long time with the implied permission of the owner or those in control of the same, and where it may be said that a portion of the property is temporarily devoted to a public use, persons using the way are not deemed to be trespassers nor mere licensees; and the owner or those in control cannot without liability make excavations, nor leave unprotected openings, so close to the line of such way as to render travel thereon unsafe. A tenant who has possession and control of premises is ordinarily bound to keep them in such condition that they will be safe for the public, and such tenant is *prima facie* liable to third persons for damages arising from negligent defects. *De Tarr v. Ferd. Heim Brewing Co.*, Kan. (61 Pac. Rep. 689). One who, in seeking to pass around his wagon which forms an obstruction on a sidewalk, as a choice between such course and another available way, walks over a defective iron grating outside of the sidewalk, but flush with it and extending to the abutting owner's building, and is injured by falling into an excavated area below, cannot recover damages from the owner where it does not appear that he had either expressly or impliedly invited the injured person to use such grating as a part of the public way. *Clapp v. La Grill*, 103 Tenn. 164 (52 S. W. Rep. 134).

**Sec. 122. Defective sidewalks, stairways and elevators.** A town is not liable for injuries to a pedestrian resulting from his falling into a hole in the sidewalk dug by a telephone company, to which the town had given the authority to erect poles in its streets, and negligently left uncovered for a short time before the accident, where the town had no actual notice

of such negligence. *Mayor, etc., of Town of Franklin v. House*, 104 Tenn. 1 (55 S. W. Rep. 153). In order to hold a city liable for injuries resulting to one on account of a defective sidewalk, the city must be shown to have had either actual or constructive notice of the defect in time to have remedied it before the accident; and where the sidewalk is constructed of material the natural life of which is not shown, and the defect in it was not calculated to attract attention, constructive notice will not be imputed to the city. *Buckley v. Kansas City*, 156 Mo. 16 (56 S. W. Rep. 319). Particular evidence in an action against a city for injury resulting from an uncovered opening in a sidewalk held to require submission to the jury of the question whether the city had constructive notice of the dangerous condition of the walk. *McKissick v. City of St. Louis*, 154 Mo. 588 (55 S. W. Rep. 859). As to the liability of a city for injuries resulting from the dangerous condition of a sidewalk on account of the accumulation of ice thereon, see *Dapper v. City of Milwaukee*, 107 Wis. 88 (82 N. W. Rep. 725); *Corey v. City of Ann Arbor, Mich.* (82 N. W. Rep. 804). In Pennsylvania it is the primary duty of property owners along a street to keep in repair the sidewalk in front of their respective properties, and an abutting owner may be held liable directly to one injured by a defective sidewalk. *Mintzer v. Hogg*, 192 Pa. St. 137 (43 Atl. Rep. 465). A lessor is liable for an injury resulting from a defective stairway used in common by several tenants of his building and which was under his control, where he has knowledge of such defect or should know of it. *Harrison v. Jelley*, 175 Mass. 292 (56 N. E. Rep. 283). For particular fact cases determining liability for injuries resulting from defective elevators or open elevator shafts in buildings, see *Hoes v. Edison Gen. Elec. Co.*, 161 N. Y. 35 (55 N. E. Rep. 285); *Rhodus v. Johnson*, 24 Ind. App. 401 (56 N. E. Rep. 942).

**Sec. 123. Liability of city for injury from defective street not affected by the injured party violating the Sunday law.** A city cannot escape liability for injuries resulting from its defective street to an employee of a railroad company while engaged in his ordinary duties, on the ground that at the time of his injury he was violating the statutes forbidding him to labor on Sunday. *City of Kansas City v. Orr*,

Kan. (61 Pac. Rep. 397; 50 L. R. A. 783). The court say: "An objection is made to a recovery because of an alleged violation of the Sunday law. The accident occurred on Sunday morning. The statute forbids all labor on that day, except works of necessity and charity. Orr was at work as a switchman, and assisting in the operation of a railway train, when he was injured and killed; and the city, assuming the position of a champion of the Sunday law, insists that it is not liable for its own negligent acts, because Orr was a transgressor of the law. The operation of a railway train or other public conveyance may be a work of necessity, and there is nothing in the record to show that the operation of the train on this occasion was not a work of necessity. Aside from that consideration, the violation of the Sunday law, if in fact it was violated, was not the efficient or proximate cause of the injury to the plaintiff, nor an essential element of her cause of action. The general rule is that a plaintiff will not be permitted to recover when it is necessary for him to prove his own illegal act or contract, as a part of his cause of action; but the time when the injury occurred does not constitute the foundation of the action, and plaintiff could prove her cause of action without proving that her husband was violating the law when the injury occurred. The time when the injury was inflicted is only an incident to the efficient cause of the injury. The injury occurred by reason of the defect in the street, and was as liable to have occurred under similar circumstances on Saturday or Monday as it did on Sunday. There was not even a remote relation between the violation of the Sunday law and the injury which resulted from the negligence of the city in maintaining its streets in a proper condition. In *Railway Co. v. Frawley*, 110 Ind. 30 (9 N. E. Rep. 600), it is said that 'the fact that one who sustains injury by the negligent or wrongful act of another may have been at the time of the injury acting in disobedience of his collateral obligation to the state, which required of him the observance of the Sunday laws, will not prevent a recovery from one whose wrongful or negligent act or omission was the proximate cause of said injury.' See, also, *Sutton v. Town of Wauwatosa*, 29 Wis. 21 (9 Am. Rep. 534); *Railway Co. v. Buck*, 116 Ind. 566 (19 N. E. Rep. 453; 2 L. R. A. 520; 9 Am. St. Rep. 883); *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co.*, 23 How.

209 (14 L. Ed. 433); *Mohney v. Cook*, 26 Pa. St. 342 (67 Am. Dec. 419); *Baldwin v. Barney*, 12 R. I. 392 (34 Am. Rep. 670); *Merritt v. Earle*, 29 N. Y. 115 (86 Am. Dec. 292); *Carroll v. Railroad Co.*, 58 N. Y. 126 (17 Am. Rep. 221); *Platz v. City of Cohoes*, 89 N. Y. 219 (42 Am. Rep. 286); *Schmid v. Humphrey*, 48 Ia. 652 (30 Am. Rep. 414); *Opsahl v. Judd*, 30 Minn. 126 (14 N. W. Rep. 575); *Railroad Co. v. Dick*, Ky. (15 S. W. Rep. 665); *Black v. City of Lewiston*, 2 Ida. 254 (13 Pac. Rep. 80); *Gross v. Miller*, 93 Ia. 72 (61 N. W. Rep. 385; 26 L. R. A. 605); *Solarz v. Railway Co.*, N. Y. Super. (29 N. Y. Supp. 1123); *Stewart v. Davis*, 31 Ark. 518 (25 Am. Rep. 576); *Van Auken v. Railway Co.*, 96 Mich. 307 (55 N. W. Rep. 971; 22 L. R. A. 33); *Patt. Ry. Acc. Law*, 64; *Cooley, Torts*, 178; *Whart. Neg.*, § 331; *Beach, Contrib. Neg.*, § 81. It is true that some of the New England courts hold to a contrary view, but such holding is against reason and the great weight of authority."

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## DEDICATION

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### EPITOME OF CASES.

**Sec. 124. Dedication of land to public use—General principles.** One holding only an equity of redemption in land cannot make a valid dedication for a public use. *Town of Gate City v. Richmond*, 97 Va. 337 (33 S. E. Rep. 615). A common law dedication does not convey a fee. *Patrick v. Young Men's Christian Ass'n*, 120 Mich. 185 (79 N. W. Rep. 208). A provision of a city charter (*St. Louis City Charter*, art. 6, § 15) forbidding the improvement or repair of streets not acquired "according to the provisions of this charter and law," does not prohibit the city from acquiring the use of a street by common law dedication. *McGinnis v. City of St. Louis*, 157 Mo. 191 (57 S. W. Rep. 755). In order to establish the dedication of a highway by user it must be shown that the user was adverse and with the knowledge

of the owner. *Niles v. City of Los Angeles*, 125 Cal. 572 (58 Pac. Rep. 190). A dedication of land cannot arise from its use for a public purpose where the acts and declarations of the owner show clearly an intention on his part not to make a dedication. *Town of Gate City v. Richmond*, 97 Va. 337 (33 S. E. Rep. 615). The intention of an owner to dedicate his land to a public use may be proved by his oral declarations. *Woodburn v. Town of Sterling*, 184 Ill. 208 (56 N. E. Rep. 378).

**Sec. 125. As to what constitutes—Particular cases.**

A stipulation in a deed "reserving from this grant the right of way over a strip of land thirty feet wide on the westerly line of said tract of land for canal or road purposes, both or either," does not of itself create a dedication of such strip to the public so as to preclude the owner from using it for the designated purposes. *Taft v. Tarpey*, 125 Cal. 376 (58 Pac. Rep. 24). The mere leaving by an owner of an irregular shaped tract of land unenclosed beside a highway which is not used for any purpose consistent with the road will not establish its dedication to the public, where the owner denies any intention to dedicate and explains his act on the ground of economy in fencing. *Town of Randall v. Rovelstad*, 105 Wis. 410 (81 N. W. Rep. 819). A married woman who for several years acquiesces in her husband moving back a fence several feet from the front of her lot to correspond with the fences of adjoining owners who have done likewise, and in the improvement by the proper municipal authorities of the unenclosed strip as a part of the street, thereby dedicates the strip to public use. *Town of Johnson City v. Wolfe*, 103 Tenn. 227 (52 S. W. Rep. 991). For particular cases in which a dedication of land for the purpose of a public street was held to be established, see *Hanger v. City of Des Moines*, 109 Ia. 480 (80 N. W. Rep. 549); *Finnegan v. City of St. Joseph*, 123 Mich. 330 (82 N. W. Rep. 51); *Kirkman v. Mayor, etc., of City of Nashville*, Tenn. (55 S. W. Rep. 1072); *Beebe's Heirs v. City of Little Rock*, Ark. (56 S. W. Rep. 791). Particular evidence held insufficient to establish the dedication of a highway. *Niles v. City of Los Angeles*, 125 Cal. 572 (58 Pac. Rep. 190). Particular facts held insufficient to show that lands occupied as a railroad right of way had been dedicated as a public street either by express

grant or by acts in pais. *Baltimore & O. S. W. Ry. Co. v. City of Seymour*, 154 Ind. 17 (55 N. E. Rep. 953).

**Sec. 126. As to what constitutes—Maps and plats.** Designating as a street a strip of land on a plat of lots, fencing it and conveying lots in reference to the plat will constitute a dedication. *In re Hunter*, 163 N. Y. 542 (57 N. E. Rep. 735; 79 Am. St. Rep. 616). If an original owner of a tract of land lays the same off into town lots, with streets and alleys between, and has the same so platted, and sells the lots with reference to such streets and alleys as boundary lines of the same, and such plat is adopted by the corporate authorities of the town in which such lots are situated, a purchaser of one of such lots is estopped from denying the dedication of such streets to public use. *Ralston v. Town of Weston*, 46 W. Va. 544 (33 S. E. Rep. 326; 76 Am. St. Rep. 834). The marking of a street and wharf on a plat by commissioners in partition proceedings in making a division of the land does not constitute a dedication of them as public highways or for public use, where such report shows clearly a contrary intention on the part of the commissioners. *Whyte v. City of St. Louis*, 153 Mo. 80 (54 S. W. Rep. 478). Where a corporation engaged in promoting a town files and records a plat thereof upon which is marked a prospective highway and bridge, and sells lots in reference thereto, representing that the highway and bridge will be constructed for the benefit of the public, and they subsequently are constructed, it is estopped to deny the dedication. *Sussman v. County of San Luis Obispo*, 126 Cal. 536 (59 Pac. Rep. 24). Where one who has platted his land into lots purchases adjoining land through which he grades a strip as an extension of a street marked on his plat and advertises by signs and maps such extension, thereby dedicates such strip as a public street, and a subsequent purchaser thereof, with knowledge of all the facts, takes subject to the dedication. *McGinnis v. City of St. Louis*, 157 Mo. 191 (57 S. W. Rep. 755). Where a recorded plat shows a street running along the river, with lots lying between the street and the river, except for a short distance, where it shows a strip too narrow for lots, with only a dotted line between it and the street as elsewhere extended, such strip is part of the street by dedication. *Boehler v. City of Des Moines*, 111 Ia. 417 (82 N. W. Rep. 914). A land owner who



consents to the including of a part of his lands within a plat of a city upon which are marked lots and streets and recognizes such plat by conveying in reference to it, using and permitting the public to use and improve the streets marked on his land, thereby establishes his implied consent to the dedication. *City of Deadwood v. Whittaker*, 12 S. Dak. 515 (81 N. W. 908); *Whittaker v. City of Deadwood*, 12 S. Dak. 523 (81 N. W. 910). An owner of lands recording a plat of a town site thereon, by appropriate language in the plat, may effect a dedication of a portion thereof for use by religious denominations who may form societies in the town and erect buildings on the dedicated land, but the fee of such lands does not vest in them, under a statute (2 Mich. Ter. Laws, 577) providing that a recorded plat of a town describing the public grounds, and stating whether they are "intended for streets, alleys, commons or other public uses," shall vest the fee of land intended for public uses in the county in which such town lies. *Patrick v. Young Men's Christian Ass'n*, 120 Mich. 185 (79 N. W. Rep. 208). The dedication of land to a public use by the execution of a plat is subject to the rights of a mortgagee who does not join in its execution and does nothing to affirm or recognize the plat. *City of Alton v. Fischback*, 181 Ill. 396 (55 N. E. Rep. 150). For particular case determining effect of plat of lots by a railroad company as a dedication of streets across its right of way, see *St. Louis & S. F. R. Co. v. Gordon*, 157 Mo. 71 (57 S. W. Rep. 742).

In order to effect a dedication of land to public use by the execution of a plat in which several persons join, the acknowledgment of each of them must be in accordance with the statute. Ill. Rev. Stat. 1845, ch. 25, § 20, construed and applied. *City of Alton v. Fischback*, 181 Ill. 396 (55 N. E. Rep. 150). For particular plat held sufficient as a statutory dedication, see *Village of North Chillicothe v. Burr*, 185 Ill. 322 (57 N. E. Rep. 32). A plat insufficient as a statutory dedication may be sufficient as a common law dedication so as to make lands subsequently granted by the grantor therein subject to the easements created by the plat. *Village of North Chillicothe v. Burr*, 185 Ill. 322 (57 N. E. Rep. 32).

**Sec. 127. Dedication of public squares or parks.**  
Owners of rural lands who make and record a plat thereof as the site for an intended city, which dedicates the streets marked

on the plat to the public and reserves and designates a certain tract as a public park, to which they refer as being "now laid out" in their published advertisements made for the purpose of selling the lots, upon which purchasers of the lots from them rely, thereby show an unconditional and present intention to dedicate the land to the public use; and such dedication becomes complete by the use of the land for park purposes by the public in the manner intended. *Conkling v. Village of Mackinaw City*, 120 Mich. 67 (79 N. W. Rep. 6). Particular instrument of dedication of lands by board of county commissioners for public streets, alleys, "market place" and "public ground" held to reserve the fee of a portion of the lands designated as a "public square." *Youngerman v. Board of Sup'rs*, 110 Ia. 731 (81 N. W. Rep. 166). For particular fact case in which a dedication of lands for a public park and the acceptance of it by the public was held not to be established by the evidence, see *City of Los Angeles v. Kysor*, 125 Cal. 463 (58 Pac. Rep. 90). Particular evidence held insufficient to show a dedication of land as a public square. *Spurrer v. Bland*, Ky. (49 S. W. Rep. 467; 29 Ky. Law Rep. 1340).

**Sec. 128. Acceptance of dedication—Necessity of and what constitutes.** Acceptance by the public or the proper local authorities is necessary to complete the dedication. *Lightcap v. Held*, 154 Ind. 43 (55 N. E. Rep. 952); *Peoria & E. Ry. Co. v. Attica, C. & S. Ry. Co.*, 154 Ind. 218 (56 N. E. Rep. 210); *In re Hunter*, 163 N. Y. 542 (57 N. E. Rep. 735; 79 Am. St. Rep. 616). A city is not obliged to signify its acceptance of a street until it is required for use; an acceptance is in time if made at any time before the offer is withdrawn. *City of Ashland v. Chicago & N. W. Ry. Co.*, 105 Wis. 398 (80 N. W. Rep. 1101). The offer to dedicate may be revoked if an acceptance by the public is not made within a reasonable time. *Niles v. City of Los Angeles*, 125 Cal. 572 (58 Pac. Rep. 190). Acceptance of a dedicated street cannot be established by proof of user by the public alone, where a statute (Mass. Pub. Stat., ch. 49, § 94) prescribes how dedicated streets may be accepted. *Moffat v. Kenney*, 174 Mass. 311 (54 N. E. Rep. 850). An acceptance of an offered dedication of land as a street is shown by the municipal authorities having control thereof passing an ordinance direct-

ing the construction of a sewer through such street, in which ordinance it refers to the street as such, designating it by name. *In re Hunter*, 163 N. Y. 542 (57 N. E. Rep. 735; 79 Am. St. Rep. 616). Use and improvement by the public in the manner intended, of lands offered to be dedicated for a public park by the owners thereof who have designated the park on a plat of the lands as a sight for a city and sold lots in reference thereto, will constitute an acceptance of the dedication without any formal action by the subsequent municipal authorities. *Conkling v. Village of Mackinaw City*, 120 Mich. 67 (79 N. W. Rep. 6). Ky. Laws 1867-68, p. 421; Stat., § 2826, construed and applied—as to what constitutes an acceptance of a dedicated street by the city of Louisville. *City of Louisville v. Snow's Adm'r*, Ky. (54 S. W. Rep. 860; 21 Ky. Law Rep. 1268). Particular evidence held sufficient to show the acceptance of a dedicated highway by the public. *Woodburn v. Town of Sterling*, 184 Ill. 208 (56 N. E. Rep. 378).

**Sec. 129. Revocation or abandonment of dedication.**

A dedication cannot be revoked after its acceptance by the proper municipal authorities, *In re Hunter*, 163 N. Y. 542 (57 N. E. Rep. 735; 79 Am. St. Rep. 616); but an offer to dedicate may be revoked if an acceptance by the public is not made within a reasonable time. *Niles v. City of Los Angeles*, 125 Cal. 572 (58 Pac. Rep. 190). A conveyance of lands before the acceptance of an offered dedication thereof is a revocation of the offer to dedicate. *Lightcap v. Held*, 154 Ind. 43 (55 N. E. Rep. 952). Citing, *City of Eureka v. Crogan*, 81 Cal. 524 (22 Pac. Rep. 693); *Trine v. City of Pueblo*, 21 Colo. 102 (39 Pac. Rep. 330); *Minneapolis & St. L. Ry. Co. v. Town of Britt*, 105 Ia. 198 (74 N. W. Rep. 933). When lands have been properly dedicated for a public use, no mere nonuser for any period of time will operate as an abandonment of the rights so conferred. *City of Ashland v. Chicago & N. W. Ry. Co.*, 105 Wis. 398 (80 N. W. Rep. 1101). Mere nonuser by a city will not bar its right to restore street crossings over a railroad right of way which have been wrongfully destroyed by a railroad company, where such company derived title to its right of way through a deed from the owner of land after he had filed and recorded a plat thereof dedicating to the public streets containing the crossings in question, and

with reference to which he executed his deed to such company, and where such company afterward recognized such crossings by planking its right of way in reference thereto. *Chicago, R. I. & Pac. Ry. Co. v. City of Council Bluffs*, 109 Ia. 425 (80 N. W. Rep. 564). Where a church organization for whose benefit the use of lands have been dedicated by the owners thereof in making a town plat, abandon the use for which the land was dedicated and convey it to another, the holders of the reversionary interest are entitled to the land, as against such grantee. *Patrick v. Young Men's Christian Ass'n*, 120 Mich. 185 (79 N. W. Rep. 208).

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## DEEDS

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### EPITOME OF CASES.

**Sec. 130. As to what constitutes a deed.** A grantor may affix his signature by the hand of another, the subscription being made in his presence and at his direction, however mentally and physically capable of writing his own name he may be at the time. *Middlebrooks v. Barefoot*, 121 Ala. 642 (25 So. Rep. 102). Particular instrument held not to be a deed but merely an executory contract to convey. *Mineral Development Co. v. James*, 97 Va. 403 (34 S. E. Rep. 37). A deed of trust executed in accordance with the statute regulating the execution of conveyances is not rendered void on account of being testamentary because it reserves to the grantor the right to use, control, improve, lease and enjoy the rents and profits of the premises during his life, with power to devise, mortgage and convey, including the power of revocation; where it expressly declares that the deed is upon trust to permit him to do these things. *Kelly v. Parker*, 181 Ill. 49 (54 N. E. Rep. 615). See opinion for collation of numerous authorities. For particular cases in which instruments are held not to be testamentary in their character, see *Whitten v. McFall*, 122 Ala. 619 (26 So. Rep. 131); *Love v. Blauw*,

61 Kan. 496 (59 Pac. Rep. 1059; 48 L. R. A. 257; 78 Am. St. Rep. 334); *Brace v. Van Eps*, 12 S. Dak. 191 (80 N. W. Rep. 197). Particular instrument held to be testamentary in its character and not to convey any present title to lands. *Barnes v. Stephens*, 107 Ga. 436 (33 S. E. Rep. 399).

**Sec. 131. Witnesses.** It is not necessary that the character of the signatures of witnesses be designated as such by the use of the word "Attest" or "Witness," where it clearly appears from the instrument that the only purpose for which the names were written was to attest the signature of the grantor. *Arrington v. Arrington*, 122 Ala. 510 (26 So. Rep. 152). Wyo. Rev. Stat., § 2744, providing that a deed executed outside of the state may be acknowledged before any officer authorized by law to take acknowledgments at the place where such acknowledgment is taken, does not dispense with the signature of the witness to the execution of the deed, as is required by § 2741. *State v. Cowhick*, Wyo. (60 Pac. Rep. 265).

**Sec. 132. Filling blanks, and alterations.** Where a deed is executed by a grantor the name of the grantee being left blank, with authority to another to fill in the name of such grantee as he may elect, the grantee whose name afterward is duly inserted takes a good title; and the mere momentary insertion of the name of the wrong person by mistake of the scrivener does not give such person any title where the name immediately is erased and that of the proper person inserted. *Thummel v. Holden*, 149 Mo. 677 (51 S. W. Rep. 404). The fact that a grantor in a deed in which the name of the grantee was left blank was guilty of carelessness in delivering it to a third person who had agreed to pay for the land but who absconded before doing so, after having inserted the name of a grantee in the deed without the latter's knowledge and had the same recorded, does not deprive him of his title in favor of a subsequent purchaser of the land under a forged deed from such grantee while the original grantor was in possession, and the latter is entitled to have both deeds cancelled. *Wiggenhorn v. Daniels*, 149 Mo. 160 (50 S. W. Rep. 807). Alterations made in a deed before it is signed or with the knowledge and consent of the parties will not invalidate it. *Coney v. Laird*, 153 Mo. 408 (55 S. W. Rep. 96). An altera-

tion in a deed made by a grantee erasing his name and inserting the name of his wife in its stead, without the knowledge of all the grantors in such deed, is ineffectual to pass the title to her. *Goodwin v. Norton*, 92 Me. 532 (43 Atl. Rep. 111).

**Sec. 133. Delivery of deed—General principles.** Delivery and acceptance are necessary to the complete execution of a deed. *Lightcap v. Held*, 154 Ind. 43 (55 N. E. Rep. 952). As against the intervening rights of third parties, a deed will take effect from the time of its delivery, although previously recorded. *Barnes v. Cox*, 58 Neb. 675 (79 N. W. Rep. 550). A grantee in a deed asserting title thereunder is not relieved from proving the delivery of the deed to him as a part of its execution by reason of the fact that the deed was made by the grantor to defraud creditors. *Koppelman v. Koppelman*, Tex. (57 S. W. Rep. 570). Even if, in order to invest an infant of tender years with the title to land, it may not be absolutely essential that there should be in every instance a manual delivery to such infant himself, or to a third person as his agent, of a voluntary conveyance in which he is named as grantee, yet no effect can be given to an instrument of that character, which the maker thereof, after signing and acknowledging in the presence of witnesses, retains in his own custody, in the absence of satisfactory proof that it was his intention that such instrument should operate immediately to convey to the infant grantee the legal title to the premises therein described. *Jenkins v. Southern Ry. Co.*, 109 Ga. 35 (34 S. E. Rep. 355). Possession of a deed by a grantee raises a presumption of its delivery, but this presumption may be overcome by evidence. *Parlin, Orensdorff & Martin Co. v. Daniels*, 111 Ia. 640 (82 N. W. Rep. 1015). The burden of showing that the deed was not delivered is upon the person who controverts such presumption. *Swank v. Swank*, 37 Or. 439 (61 Pac. Rep. 846).

**Sec. 134. Delivery of deed—Particular cases.** A grantor who has executed a deed to land to his grandson and placed it with his other private papers in a box in a bank does not effect a delivery of the deed by delivering the key to the box to the grandson more than two months before his death without saying anything to the grantee or any one in

his behalf about the delivery of the deed. *Walls v. Ritter*, 180 Ill. 616 (54 N. E. Rep. 565). Where a husband testifies that a deed executed by him to his wife which was subsequently recorded without his consent or knowledge, was executed by him in order to allay the fears of his wife who was bordering on insanity, and that he did not deliver the deed to her or intend that it should take effect, the question whether it was executed with intent to pass title is for the jury. *McCartney v. McCartney*, 93 Tex. 359 (55 S. W. Rep. 310). For particular cases in which the evidence is held sufficient to show delivery of a deed, see *Reed v. Smith*, 125 Cal. 491 (58 Pac. Rep. 139); *South Portland Land Co. v. Munger*, 36 Or. 457 (60 Pac. Rep. 5); *Arrington v. Arrington*, 122 Ala. 510 (26 So. Rep. 152). Particular evidence held insufficient to show delivery of deed. *In re Nicholls*, 190 Pa. St. 308 (42 Atl. Rep. 692); *Pratt v. Griffin*, 184 Ill. 514 (56 N. E. Rep. 819); *Hollenbeck v. Hollenbeck*, 185 Ill. 101 (57 N. E. Rep. 36); *Austin v. Austin*, 105 Wis. 680 (81 N. W. Rep. 1012); *Shanklin v. McCracken*, 151 Mo. 587 (52 S. W. Rep. 339).

**Sec. 135. Date of delivery and taking effect of deed.**

A deed is presumed to be delivered at the time of its date, but this presumption may be rebutted. *Buker v. Carroll*, 1 Penn. (Del.) 559 (42 Atl. Rep. 986); *Schweigel v. L. A. Shakman Co.*, 78 Minn. 142 (80 N. W. Rep. 871). See last case for particular evidence held insufficient to rebut the presumption. Upon this subject, in the case of *Crossen v. Oliver*, 37 Or. 514 (61 Pac. Rep. 885), the supreme court of Oregon say: "Where the deed and its acknowledgment bear the same date, the authorities are in perfect accord to the effect that where the deed is found in the possession of the grantee, or a delivery is shown without fixing the date at which it is made, the presumption is that it was delivered at the time it bears date. There is a disagreement among the authorities whether the date of the deed or of the acknowledgment should prevail, where they are not in accord. The presumption is disputable, however, and the date of its actual delivery may be proven aliunde. 9 Am. & Eng. Enc. Law (2nd Ed.), 152, 153; *Kendrick v. Dellinger*, 117 N. C. 491 (23 S. E. Rep. 438); *Ten Eyck v. Whitbeck*, N. Y. (35 N. Y. Supp. 1013); *Magee v. Allison*, 94 Ia. 527 (63 N. W. Rep. 322); *Nichols v. Sadler*, 99 Ia. 429 (68 N. W. Rep. 709); *Geiss v. Oden-*

heimer, 4 Yeates, 278 (2 Am. Dec. 407); Breckenridge v. Todd, 3 T. B. Mon. 52 (16 Am. Dec. 83); Hall v. Benner, 1 Pen. & W. 402 (21 Am. Dec. 394). The date of acknowledgment of the deed in question is not shown, as we have not the instrument before us, but the date of the deed appears in the record; and, under this condition, the presumption ought to prevail that it was delivered at the date which it bears of its execution." Where a grantor who has made an unconditional delivery of deeds to a third party to be delivered by him to the grantees, subsequently retakes possession of the deeds and makes the delivery directly himself, they will take effect from the date of the first delivery. Clark v. Clark, 183 Ill. 448 (56 N. E. Rep. 82; 75 Am. St. Rep. 115).

**Sec. 136. Delivery by recording—Presumptions.** The recording of a deed creates a presumption of its delivery. McReynolds v. Grubb, 150 Mo. 352 (51 S. W. Rep. 822; 73 Am. St. Rep. 448); Cumberland Land Co. v. Daniel, Tenn. (52 S. W. Rep. 446); Serles v. Serles, 35 Or. 289 (57 Pac. Rep. 634); but where a deed which the grantor caused to be recorded is not actually delivered, but possession of it is retained by him, he is not estopped from showing that the registration was not intended to take the place of delivery or to give effect to the conveyance, Koppelman v. Koppelman, Tex. (57 S. W. Rep. 570). Delivery of a trust deed to a recording officer to be recorded, by the grantors therein, at the direction of the attorney of the trustee who prepared it, is sufficient. Lawrence v. Lawrence, 181 Ill. 248 (54 N. E. Rep. 918). The delivery of a deed by the grantor to the authorized deputy of the proper officer with instructions to record it, was held to constitute a sufficient delivery to the grantee, where his subsequent conduct was such as to show an acceptance of the deed, although it was not afterward recorded because of failure to comply with a statute (Ky. Stat., § 520) requiring the payment of taxes before the recording of a deed. Martin v. Bates, Ky. (50 S. W. Rep. 38; 20 Ky. Law Rep. 1798). The presumption of delivery arising from the recording of a deed conveying land in trust for the grantor's wife during her life, is not rebutted by the deed being found after his death in a trunk containing papers belonging to both of them. Allen v. Hughes, 106 Ga. 775 (32 S. E. Rep. 927).



**Sec. 137. Delivery to third persons—Agents.** Delivery of a deed by the grantor to the agent of the grantee is sufficient, although the deed is not actually delivered by the agent to his principal until after the grantor's death. *Swank v. Swank*, 37 Or. 439 (61 Pac. Rep. 846). Placing a deed in the hands of the grantor's agent to be held by him until the consideration is paid does not constitute a delivery to the grantee. *Sowards v. Moss*, 59 Neb. 71 (80 N. W. Rep. 268). The authority of one employed as agent of the grantor to carry deeds to his grantees is terminated by the death of the grantor, and where this occurs before delivery of the deed by the agent he can make no valid delivery of the deed thereafter. *Furenes v. Eide*, 109 Ia. 511 (80 N. W. Rep. 539; 77 Am. St. Rep. 545).

**Sec. 138. Delivery to third person to be delivered after grantor's death.** A grantor who delivers his deed to a third party with instructions to deliver to the grantee at the grantor's death, in such a manner as to place the deed beyond his power to recall, makes such a delivery as will pass the property to the grantee at the grantor's death. *Fulton v. Priddy*, 123 Mich. 298 (82 N. W. Rep. 65). But the delivery of a deed by the grantor therein to a third party with instructions to deliver to the grantee if he survive the grantor, otherwise the deed to be returned to the grantor, is not sufficient to vest the title in the grantee, *Kenney v. Parks*, 125 Cal. 146 (57 Pac. Rep. 772); and in such a case it is held that even a delivery to the grantee after the grantor's death is ineffectual, *Williams v. Daubner*, 103 Wis. 521 (79 N. W. Rep. 748); 74 Am. St. Rep. 902).

**Sec. 139. Acceptance of deed—Necessity of and what constitutes.** Acceptance is necessary to complete the execution of a deed. *Pratt v. Griffin*, 184 Ill. 514 (56 N. E. Rep. 819). The acceptance of a deed made to infants will be presumed where it is beneficial to them, *Arrington v. Arrington*, 122 Ala. 510 (26 So. Rep. 132); and a deed of trust cannot be defeated on the ground of the want of an acceptance thereof by its beneficiaries where the trustee named in the deed accepted it and took possession of the property, *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565 (57 S. W. Rep. 1095). An acceptance by a husband of a deed

of land to his wife for which he paid the consideration and which he caused to be conveyed to her, will be construed as an acceptance by her, whether she assented to it or not. *Jones v. Hightower*, Ky. (52 S. W. Rep. 826; 21 Ky. Law Rep. 576).

**Sec. 140. Construction of deeds—General rules and principles.** The whole of a deed and all of its parts should be construed together. *McDougal v. Musgrave*, 46 W. Va. 509 (33 S. E. Rep. 281). The word "convey" will be given the same meaning as the word "grant" where it clearly appears to have been used instead thereof. *Chapman v. Charter*, 46 W. Va. 769 (34 S. E. Rep. 768). The phrase "next of kin," which has not acquired a popular meaning, but has a technical meaning only, when standing alone is never held to include heirs at law. *New York Life Ins. & T. Co. v. Hoyt*, 161 N. Y. 1 (55 N. E. Rep. 299). In the construction and enforcement of a deed a court of law may disregard an erroneous recital of the initials of the grantee in one part of the instrument where they are given correctly in several other parts. *Kansas City & A. Ry. Co. v. Smith*, 156 Mo. 608 (57 S. W. Rep. 555). If the language of a deed is ambiguous, the court, in order to arrive at the intention of the parties, may look at their subsequent acts, and the manner in which the thing granted has been used and enjoyed under the grant. *Gibney v. Fitzsimmons*, 45 W. Va. 334 (32 S. E. Rep. 189). In determining the intention of parties to a deed the language used, the circumstances surrounding them, and the objects which they evidently had in view are all to be considered together. *McCoy v. Fahrney*, 182 Ill. 60 (55 N. E. Rep. 61). But where the language is clear, unequivocal, and unambiguous, the contract is to be interpreted by its own language, and courts are not at liberty to look at extrinsic circumstances surrounding the transaction, or elsewhere, for reasons to ascertain its intent. The understanding of the parties must be deemed to be that which their own written agreement declares. *New York Life Ins. & T. Co. v. Hoyt*, 161 N. Y. 1 (55 N. E. Rep. 299). Where a grantor, by reference to other conveyances, grants a fee in land used as a lane, in connection with other lands conveyed, such estate cannot be cut down to an easement by a subsequent clause in the

deed conveying the use of the lane. *Chapman v. Longworth*, 71 Vt. 228 (44 Atl. Rep. 352).

**Sec. 141. Construction of deeds—Inconsistent and repugnant clauses—Conflict between granting and habendum clauses—Intention of parties.** As a general rule, in the case of inconsistent clauses in a deed, the earlier clause prevails if the inconsistency be not so great as to avoid the instrument for uncertainty. *Chapman v. Longworth*, 71 Vt. 228 (44 Atl. Rep. 352); *Blackwell v. Blackwell*, 124 N. C. 269 (32 S. E. Rep. 676). Repugnant words must yield to the purpose of the grant, where such purpose is clearly ascertained from the premises of the deed, though such words stand first in the grant. *Goldsmith v. Goldsmith*, 46 W. Va. 426 (33 S. E. Rep. 266). The reservation of a life estate is not repugnant to a general granting clause in a deed. *McDougal v. Musgrave*, 46 W. Va. 509 (33 S. E. Rep. 281).

A granting clause in a deed which "conveys and warrants" the land conveyed without otherwise defining the nature and character of the estate granted, is not repugnant to the habendum clause which vests the grantee with the life estate; and the rule that an estate in fee conveyed by the granting clause cannot be divested by the habendum clause has no application. *Welch v. Welch*, 183 Ill. 237 (55 N. E. Rep. 694). A deed to a quarter section of land, which in the granting clause purports to convey to the grantee a fee-simple title, but which in the habendum clause reads as follows: "To have and to hold the same during her natural life, and at her death to be divided as follows: Sixty-five acres north of the railroad right of way to Mary K. Blodgett, and the balance to go to James Q. Blodgett,"—is a conveyance of a life estate to one, with remainders in fee to the others; and the clause attempting to create the remainders is not void for repugnancy to the granting clause. *Palmer Oil & Gas Co. v. Blodgett*, 60 Kan. 712 (57 Pac. Rep. 947). The court say: "Modern theories, however, put deeds of real estate, for the purposes of construction of their terms, in the list with all other kinds of written contracts, and they endeavor to ascertain the intent of the parties executing them more from the language of the whole instrument than from the relative positions of

the different parts or clauses. No one reading the conveyance above quoted but will admit that the grantor's intention was to convey a life estate to Mary Blodgett, with fee in remainder to James Q. and Mary K. Blodgett. That, as a proposition of fact, is self-evident. Effect must be given to this intention, if possible. The later authorities not only make it possible, but require it. In *Harriot v. Harriot*, (Sup) 49 N. Y. Supp. 447, the court states and decides a case as follows: 'In November, 1855, the owner of a certain real property executed a deed of gift thereof to his son, which conveyed the same, together with all the estate, right, title and interest of the grantor, "to have and hold \* \* \* unto the said party of the second part, from and after May 1, 1861, for and during the residue of his natural life, with remainder over \* \* \* until his lawful issue, \* \* \* as tenants in common; \* \* \* and, in case any child should die \* \* \* leaving lawful children, then such children shall take," etc. The grantor, also, in terms reserved the intermediate estate prior to May 1, 1861. The grantee, who never had issue, died intestate in 1897, leaving the plaintiff, his widow. Held that the deed conveyed to the grantee only a life estate.' In the opinion in this case it was remarked: 'Usually the granting clause or the premises of the deed would indicate what was intended to be conveyed. By our statute it is provided (1 Rev. Stat., p. 748, § 1), among other things, that any grant of real estate shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied from the terms of such grant. If there is a plain and open repugnancy between the granting clause and the habendum, and nothing else to be considered, the larger estate granted may not be cut down or reduced by the habendum; but, in the construction of deeds, as of other instruments, the real question is, what was the intention of the grantor, to be gathered from all the terms of the instrument? Here it seems to me that it is plain that this grantor merely intended that his son should have a life estate in the property.' In *Barnett v. Barnett*, 104 Cal. 298 (37 Pac. Rep. 1049), it was held: 'In construing a deed, the intention of the grantor is to be ascertained from the entire instrument, including the habendum as well as the granting clause; and if it appears

from such construction, that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum will prevail over the granting clause.' In the opinion it was said: 'The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein; but, for the purpose of ascertaining this intention, the entire instrument, the habendum as well as the premises, is to be considered, and if it appear, from such consideration, that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum will prevail over the granting clause. *Faire v. Daley*, 93 Cal. 670 (29 Pac. Rep. 256); *Pallissier v. Corker*, 103 Cal. 516 (37 Pac. Rep. 465). It is in such case, to be considered as an addendum or proviso to the conveyancing clause, which, by a well-settled rule of construction, must control the conveyancing clause, or premises, even to the extent of destroying the effect of the same.' In *Bodine's Adm'rs v. Arthur*, 91 Ky. 53 (14 S. W. Rep. 904; 34 Am. St. Rep. 162), it was ruled: 'When there is a repugnancy between the granting clause and the habendum of a deed, and it cannot be determined, from the whole instrument and attendant circumstances, that the grantor intended that the habendum should control, the granting clause must control; but where it appears, from the whole conveyance and attendant circumstances, that the grantor intended the habendum to enlarge, restrict, or repugn the granting clause, the habendum must control, for the reason that it is the last expression of the grantor's wish as to the conveyance.' See, generally, upon the construction of deeds, and conflicts between the granting and habendum clauses, 1 Devl. Deeds, § 213 et seq.; 2 Devl. Deeds, § 836."

**Sec. 142. Construction of deeds.—**Word "children" does not include illegitimates. The words "child" and "children," appearing in a deed conveying to an unmarried female certain property during her life, and at her death to such child or children as she may leave living at the time of her death, will not include an illegitimate child of such female, born several years after the making of the deed, unless it plainly appears from the language of the instru-

ment that it was the intention of the grantor that an illegitimate child was to take thereunder, *Johnstone v. Taliaferro*, 107 Ga. 6 (32 S. E. Rep. 931; 45 L. R. A. 95), collating and reviewing numerous cases; and in construing a grant over a vested remainder in fee simple, in case the first taker "die without children" the word "children" will be construed to mean legitimate children, *Hall v. Cressey*, 92 Me. 514 (43 Atl. Rep. 118). The court say: "The first important question is, did Stephen 'die without children'? Unless he did, the defendant has no title, in any event. By the common law, a bastard was *filius nullius*. He possessed no inheritable blood. The sins of the father were visited upon the child. Modern sentiment, as expressed in modern statutes, is more merciful to the unfortunate offspring of illicit intercourse. In this state, as in most others, by pursuing statutory methods, a bastard may be legitimated, and may acquire rights of inheritance, and some or all of the usual consequences of consanguinity. So it was in the case at bar. Stephen gave his daughter statutory recognition. But that conferred only statutory rights and privileges. We are not concerned with the status of this child under a statute, but are endeavoring to ascertain the legal meaning of the word 'children' in a deed. We do not perceive how that meaning can be enlarged in this case, nor how the interpretation of the word can be aided by reference to a statutory condition which was created many years after the deed was executed. Unless there is something in this deed—and there is not—to show that the grantor contemplated that his son Stephen would become the father of a bastard child, and intended that child to be included in the term 'children,' we must give the word its ordinary common-law signification. The authorities are to the effect that the word 'child' in a will or deed means a legitimate child. In *Bolton v. Bolton*, 73 Me. 299, the late Judge Virgin, after stating that the word 'widow' in a life insurance policy meant the lawful widow, used the following language: 'The foregoing rules find numerous illustrations in the construction of wills wherein legacies and devises are given to a "child" or "children" of some person named, and such person has legitimate and illegitimate child or children, in which case the legitimate, and not the illegitimate, issue take. The word "children," it is

said, means *prima facie* legitimate children, as much as if the word "legitimate" were written before it.' An illegitimate child was not permitted to take under a bequest in a will which gave a legacy to 'nephews' as a class, in *Lyon v. Lyon*, 88 Me. 395 (34 Atl. Rep. 180). So, in the construction of the statute which provides, after the payment of debts, funeral expenses, etc., that, 'if there be no kindred to the said intestate, then she [the widow] shall be entitled to the whole of said residue,' it was held in *Hughes v. Decker*, 38 Me. 153, that the term 'kindred' meant lawful kindred. In *Blacklaws v. Milne*, 82 Ill. 505 (15 Am. Rep. 339), it was held that the word 'children,' in a statute regulating descent, had reference to lawful children only. In construing the Massachusetts statute, which provided that 'where any testator shall omit to provide in his will for any of his children they shall take the same share that they would have been entitled to if he had died intestate,' the court held that the word 'children' did not include illegitimate children. See, also, *Cooley v. Dewey*, 4 Pick. 93 (16 Am. Dec. 326); 2 Jarm. Wills, 217. The rule of interpretation drawn from the foregoing cases of wills and statutes seems to be equally applicable in cases of deeds."

**Sec. 143. Construction of deeds—Conveyance over by husband to "all the children" of his wife.** A stipulation in a deed conveying all of the grantor's property in trust for the benefit of his creditors, which directs that property remaining after payment of his debts should be conveyed to "all the children" of his wife, refers to children born to her by him and does not include children born to the wife by a subsequent husband. *McCoy v. Fahrney*, 182 Ill. 60 (55 N. E. Rep. 61). The court say: "The instrument under consideration is in the nature of a postnuptial marriage contract or settlement. In marriage settlements it is the presumption that the parties thereto intend to provide for the issue of the marriage, and clear language in the deed is necessary to overcome this presumption. *Wallace v. Wallace*, 82 Ill. 530. In *Johnson v. Webber*, 65 Conn. 501 (33 Atl. 506), a bequest to a granddaughter, and in case such granddaughter should die, leaving a husband surviving, such husband should take the bequest, was construed to apply only to the then husband of the granddaughter, and not

to a second husband, on the ground the manifest intent of the testator, gathered from the entire will, could not be overcome by the particular words employed. In *Elliott v. Elliott*, 117 Ind. 380 (20 N. E. Rep. 264; 10 Am. St. Rep. 54), a devise of real estate to one designated in a will as the wife of the testator, though he had a former living wife from whom he had not been divorced, 'with power to dispose of the same as she [the wife named in the will] may think best for herself and children,' and a bequest of personal property to the wife, 'to have and use as she may think best and proper for herself and my children: provided, that in case my beloved wife Mary Ann Elliott, should marry after my decease, then and in that case it is my will that two-thirds of all my property, both real and personal, shall descend in equal portions to my children,' were held to be a devise and bequest to the children of the testator born of the person named in the will as his wife, to the exclusion of other children born to the testator by his lawful wife. The ground of the decision was that though ordinarily, when a man speaks of his children, he is understood to mean his legitimate children, it was plain from the context of the will, taken as a whole, and the situation and circumstances of the family and property of the testator, that he did not mean by the words 'my children' to refer to his children born of his lawful wife. The intent of the testator was enforced in *Gelston v. Shields*, 78 N. Y. 275, though against the literal language of the will, the words 'my children' being held to refer to the children by the person named in his will as his wife, and not to include children born of a former wife. In *Thomas v. Crosby*, 171 Mass. 510 (51 N. E. Rep. 6), a trust deed executed by a husband and father was declared to be a family settlement, and the word 'children' of the grantor was, in view of the manifest intent which animated the grantor, held to refer, not to all his children, but only to such as were born to him of his then living wife, and to the exclusion of those born to the grantor by another wife."

**Sec. 144. Construction of particular deeds.** Title to the lot, as well as to the house, is passed by a deed conveying "all the house and premises situated on" a lot described "together with all and singular, the hereditaments



and appurtenances thereunto belonging or in any way appertaining." *Bawden v. Hunt*, 123 Mich. 295 (82 N. W. Rep. 52). A conveyance of land from a husband to his wife which recites that it is made on the express understanding that if she abandon and leave him at any time before his death the premises are to revert back to him upon payment by him, his heirs or assigns, of a certain sum of money to her, and in case she survive him the land shall belong to her during her lifetime, and at her death revert and become the property of his heirs upon their payment of a like sum, creates in the wife a fee simple, subject to a reversion on condition subsequent. *Martin v. Hafer*, Mich. (82 N. W. Rep. 1053). A conveyance to a trustee in the usual form of a deed conveying title in praesenti stipulating that he shall hold the premises for the term of twenty years from and after the death of the grantor for the sole use of the latter's children or those of them who may be living at that time or their children, dividing the rents and profits among them, the trustee at the end of such period to sell and divide the proceeds per stirpes among the grantor's descendants, which contained the usual habendum clause, was held to convey the title in praesenti. *Sumner v. Harrison*, 54 S. C. 353 (32 S. E. Rep. 572). A conveyance upon which a consideration of \$2,000 is advanced, by a grantor having only the naked possession of the premises, the title and right of possession thereof being in the United States, of "all his right, title, and interest" in the land, in which it is stipulated that the grantee is "to hold the same, together with, all and singular, the appurtenances and privileges thereunto belonging or in any wise thereto appertaining, and all the right, title, interest, and claim whatsoever of the party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said second party, his heirs and assigns, forever," will be held to be an absolute conveyance in fee simple, and not merely a quitclaim of the grantor's interest. Such a conveyance will pass to the grantee the title subsequently acquired by the grantor, and in construing the latter's warranty in the deed against the claims of every person whatever, "saving and excepting the title of the United States," the quoted expression being a patent ambiguity, will be rejected as surplusage. *Balch v. Ar-*

nold, Wyo. (59 Pac. Rep. 434). For construction of particular deed, see *Sassenberg v. Huseman*, 182 Ill. 341 (55 N. E. Rep. 346).

**Sec. 145. Recitals in deeds.** A recital in a deed as to the consideration therefor is not conclusive upon one who does not claim under the deed, but in opposition to it. *King v. Mead*, 60 Kan. 539 (57 Pac. Rep. 113). Neither the recitals in a receiver's deed of his appointment, the order of sale and sale to the grantee, nor the court's endorsement of its approval of the deed, are sufficient to dispense with proof of the facts recited, as against third persons. *Lawless v. Stamp*, 108 Ia. 601 (79 N. W. Rep. 365).

**Sec. 146. Exceptions and reservations.** An exception in a deed conveying riparian lands and rights, of a certain described portion of the land, carries with it the wharf and riparian rights appurtenant to the land excepted. *Cox v. McClure*, 71 Conn. 729 (43 Atl. Rep. 310). An exception in a deed given by a husband and wife in consideration of their future support, of a certain described portion of land conveyed on which it is stipulated that the grantor "allows his son, his wife and children, to live as long as they please, but not to sell," such son not being a party to the deed, passes no title to the land to him, but simply the right of himself and family to live thereon. *Brown v. Darling*, Ky. (52 S. W. Rep. 936; 21 Ky. Law Rep. 653). A deed of land by the owner thereof who previously has platted the same for a town site, in which he reserves from the sale certain lots together with all the ground intended for public purposes, does not pass any title or interest which he may have in land dedicated by the plat to the use of religious denominations. *Patrick v. Young Men's Christian Assn*, 120 Mich. 185 (79 N. W. Rep. 208). A reservation by the grantor of the right to lease certain buildings on the granted premises for a specified time, in effect, is a reservation of the use of the land on which the buildings stand for the specified time; and his residuary legatee may maintain ejectment against a tenant of such buildings in default in the payment of rent. *Fiske v. Brayman*, 21 R. I. 195 (42 Atl. Rep. 878). Construing a conveyance by one owning lands on both sides of

a river, of land on the east side thereof, "reserving to myself the right of building a dam across said river at any point against said land, together with the right of flowage of said land at any and all times caused by said dam when constructed; also, reserving a piece of land fronting on said river in the immediate vicinity of the east end of said dam, twelve rods in length on the bank of said river, and extending back far enough, same width, to comprise one acre of land," it is held that the quoted words do not create an exception, but a reservation which includes an acre on the side of the water's edge and the half of the bed of the river in front thereof; that the right to locate such acre is not lost by the grantor's delay in making the selection, and may be exercised by his heirs after his death; and that the right of flowage is appurtenant to the right of which the mill and dam will be a part. *Smith v. Furbish*, 68 N. H. 123 (44 Atl. Rep. 398; 47 L. R. A. 226). See opinion for exhaustive review of authorities. For a definition and distinction between a reservation and an exception, see *Youngerman v. Board of Sup'rs*, 110 Ia. 731 (81 N. W. Rep. 166).

**Sec. 147. Restraints upon alienation.** Ky. Civ. Code Prac., § 490, subd. 2, which authorizes a vested estate in real property jointly owned by two or more persons to be sold by an order of a court of equity when the estate is in possession, and cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein, does not authorize the court to disregard a provision in a deed to the effect that the property embraced in it shall not be alienated or incumbered until the youngest child shall arrive at the age of twenty-one. *Young v. Young*, Ky. (49 S. W. Rep. 1074; 20 Ky. Law Rep. 1741).

**Sec. 148. Restrictions as to use of property—Who may enforce.** Where an owner sells a portion of his lands, with a covenant restricting its use, a subsequent grantee of another portion from the same owner may enforce the covenant against the original grantee, and against all subsequent purchasers from him with notice of the covenant. But a prior purchaser from the original owner cannot en-

force a restriction imposed by the latter upon a lot subsequently conveyed, unless in the prior deed there was a grant of a right in the residue of the land retained by the vendor, or a stipulation that the restrictions put upon the lot sold by the prior deed should also be imposed upon the remaining property when sales should be made to subsequent purchasers, or other indications that all the lots were sold as parts of a uniform building scheme. *Roberts v. Schull*, 58 N. J. Eq. 396 (43 Atl. Rep. 583).

**Sec. 149. Restrictions as to the erection of buildings—**  
**Building lines—Loss or waiver of right to enforce.** A condition in a deed that any dwelling house "erected" upon the premises by the grantee shall cost not less than a specified sum, is violated by a house worth much less being "placed upon" the premises by his moving it thereupon. *Quatman v. McCray*, 128 Cal. 285 (60 Pac. Rep. 855). See opinion for particular facts held not to be a waiver of such condition. Where the owner of lots which he designed to sell for building purposes had prepared for use in conveying them a deed printed in blank containing a provision "that the lot hereby conveyed is not to be subdivided, and that no more than one residence is to be erected upon the same," with a blank left after the word "lot" for the letter "s," afterward conveyed two of such lots, designated by number, using one of his deeds in which the blank referred to was filled so as to make the covenant read: "the party of the second part hereby further covenants and agrees to and with the parties of the first part, for and in behalf of himself, that the lots hereby conveyed is not to be subdivided, and that no more than one residence is to be erected upon the same," it is held that the words "the same" refer to the two lots, not to each of the lots, and that the restriction prevents the erection of more than one residence. *Gamm v. Renner*, 59 N. J. Eq. 307 (44 Atl. Rep. 632). A contract by one about to construct a building on his lot that he will not build "any part of the front foundation wall" beyond a certain line, does not prevent his building a bay window and extending the upper story of his building beyond such line. *Knight v. Hallinger*, 58 N. J. Eq. 223 (42 Atl. Rep. 1045). Where the uniformity intended to be preserved by an establishment of a restriction as to the building line of lots has

been destroyed by the erection of buildings which encroach beyond the line for varying distances, in which those interested have acquiesced, the restriction will be deemed to be waived and one subsequently seeking to erect a building on a lot will not be restricted to a line reached by the greatest encroachment. *Ewertsen v. Gertsenberg*, 186 Ill. 344 (57 N. E. Rep. 1051; 51 L. R. A. 310). A conveyance which stipulates that it is "made upon the express condition" that the grantees, their heirs and assigns, shall never erect any building nearer the street than the store building thereon, conveys a conditional fee with right of reverter in the grantor until his death, which right descends to his heirs or devisees; but where it appears that such condition was inserted to protect the personal comfort of the grantor who resided near by, during his life time, the condition is personal as to him and does not pass as an appurtenance to a lot adjoining the land conveyed, which the grantor subsequently conveyed to another. *Clapp v. Wilder*, 176 Mass. 332 (57 N. E. Rep. 692; 50 L. R. A. 120). Where neighboring proprietors of urban lots are bound by a covenant in a deed under which both hold not to erect buildings within a prescribed distance from the street upon which the lots abut, either is entitled to an injunction to enforce observance of the covenant by the other. Relief will not be denied to a plaintiff because he has erected a porch in front of his residence, and within the prescribed distance from the street, when the purpose of the covenant is to secure and preserve the desirability of the street for private residence, and the porch does not substantially interfere with the easement of neighboring proprietors for light, air and view. *McGuire v. Caskey*, 62 O. St. 419 (57 N. E. Rep. 53). A restriction as to a building line of lots in a certain plat-  
ted addition, contained in a prior conveyance forming his chain of title, may be binding upon a grantee although not mentioned in the immediate conveyance to him; but the right to enforce such a restriction may be lost by continued acquiescence in its violation by lot owners and a change in the character of the property to such an extent that the enforcement of the restriction would be a disadvantage to the property owners generally. *Ewertsen v. Gertsenberg*, 186 Ill. 344 (57 N. E. Rep. 1051; 51 L. R. A. 310). In support of the last proposition, the court say: "Equity will not, as a rule, enforce a re-

striction, where, by the acts of the grantor who imposed it, or of those who derived title under him, the property, and that in the vicinage, has so changed in its character and environment and in the uses to which it may be put as to make it unfit or unprofitable for use if the restriction be enforced, or where to grant the relief would be a great hardship on the owner and of no benefit to the complainant, or where the complainant has waived or abandoned the restriction; or, in short, it may be said that where, from all of the evidence, it appears that it would be against equity to enforce the restriction by injunction, relief will be denied, and the party seeking its enforcement will be left to whatever remedy he may have at law. *Brewery Co. v. Primas*, 163 Ill. 652 (45 N. E. Rep. 145); *Coughlin v. Barker*, 46 Mo. App. 54; *Duke of Bedford v. Trustees British Museum*, 2 Mylne & K. 552; *Sayers v. Collyer*, 24 Ch. Div. 180; *Page v. Murray*, 46 N. J. Eq. 325 (19 Atl. Rep. 11); *Jackson v. Stevenson*, 156 Mass. 496 (31 N. E. Rep. 691; 32 Am. St. Rep. 476); *Bangs v. Potter*, 135 Mass. 245; *High, Inj.* § 1158; *Trustees v. Thatcher*, 87 N. Y. 311 (41 Am. Rep. 365).” Particular stipulation in a contract of sale concerning the establishment of a building line held not to run with the land. *Hutchinson v. Thomas*, 190 Pa. St. 242 (42 Atl. Rep. 681). For construction of particular stipulation in a deed against the erection of a building within a certain distance of an avenue, see *Evans v. Mary A. Riddle Co.*, N. J. Eq. (43 Atl. Rep. 894).

**Sec. 150. Cancellation of deed—General principles—**

**Grantor's mental incapacity.** The mere lack of consideration for a deed will not justify setting it aside at the suit of the grantor, no rights of third parties intervening, but such fact is admissible as evidence of fraud on the part of the grantee. *Howard v. Turner*, 125 N. C. 107 (34 S. E. Rep. 229). A quitclaim deed by one having an interest in lands made to one in consideration of his parol promise to institute proceedings to perfect the grantor's title, cannot be cancelled by the latter as against subsequent bona fide purchasers for value, on account of the grantee failing to perform his agreement. *Kesler v. Johnson*, 123 Mich. 96 (81 N. W. Rep. 922). A grantee of a deed obtained from one mentally incompetent to transact business, through the undue influence of a third party, who

has no knowledge or notice of the grantor's disability or of the undue influence, will not be required to return the property without restoration of the consideration paid by him. *Eldredge v. Palmer*, 185 Ill. 618 (57 N. E. Rep. 770; 76 Am. St. Rep. 59). Where a party to a deed or other contract has legal mental capacity to make it, and there is no fraud or undue influence moving him to the act, the deed or contract cannot be impeached simply because it is imprudent, unreasonable, or unequal. *Farnsworth v. Noffsinger*, 46 W. Va. 410 (33 S. E. Rep. 246). See opinion as to what evidence is admissible in determining the mental capacity of the grantor in a deed. For particular cases in which evidence is held sufficient to authorize the cancellation of a deed on account of the grantor's mental incapacity, see *Beasley v. Beasley*, 180 Ill. 163 (54 N. E. Rep. 187); *Galt v. Provan*, 108 Ia. 561 (79 N. W. Rep. 357); *Holmes v. Martin*, 123 Mich. 155 (81 N. W. Rep. 1072); *Sedgwick v. Jack*, Ia. (82 N. W. Rep. 1027); *Kinnah v. Kinnah*, 184 Ill. 284 (56 N. E. Rep. 376). For particular cases in which the evidence is held insufficient to authorize the cancellation of a deed on account of the grantor's mental incapacity, see *Ford v. Jones*, 22 Wash. 111 (60 Pac. Rep. 48); *Swank v. Swank*, 37 Or. 439 (61 Pac. Rep. 846); *Cutts v. Young*, 147 Mo. 587 (49 S. W. Rep. 548); *McKissock v. Groom*, 148 Mo. 459 (50 S. W. Rep. 115).

**Sec. 151. Cancellation of deed for fraud.** Fraud may be proved by circumstantial evidence. *Todd v. Sykes*, 97 Va. 143 (33 S. E. Rep. 517). The right to set aside a deed on account of its having been obtained by fraud is not assignable. *Haseltine v. Smith*, 154 Mo. 404 (55 S. W. Rep. 633). Where one is induced to convey his inherited interest in lands for one-half of their value by false representations of his grantee as to the extent of his interest, the conveyance will be set aside. *Wenegar v. Bollenbach*, 180 Ill. 222 (54 N. E. Rep. 192). One who, after foreclosure of a mortgage, obtains from the mortgagor who does not believe that he has any interest in the premises but who in fact has an interest on account of a defect in the foreclosure proceedings, a quitclaim deed of his interest by fraudulently representing that it is necessary to clear up the title, thereby does not acquire title. *Stillman v. Rosenberg*, 111 Ia. 369 (82 N. W. Rep. 768). An owner of land in possession thereof cannot maintain an action to cancel

a conveyance of the same by one occupying a small portion thereof and whom the records show has no title, which he was fraudulently induced to make by his grantees, but his remedy is an action for damages. *Hannibal & St. J. R. Co. v. Nortoni*, 154 Mo. 142 (55 S. W. Rep. 220). For particular cases in which the evidence was held sufficient to authorize the cancellation of a deed for fraud, see *Horton v. Lee*, 106 Wis. 439 82 N. W. Rep. 360; *James v. Groffiff*, 157 Mo. 402 (57 S. W. Rep. 1081). Particular evidence held insufficient to authorize the cancellation of a deed on account of fraud. *Heyrock v. Surerus*, 9 N. Dak. 28 (81 N. W. Rep. 36).

**Sec. 152. Cancellation of deed for undue influence and duress.** The undue influence alone that a child may have over its parent, through the mere love and affection that the parent has for it, will not justify the setting aside of a deed upon that ground alone, however unfair or unjust it may be to others, for such influence is not unlawful or fraudulent. In passing upon the question of undue influence the relation of the parties, the mental condition of the grantor in the deed sought to be set aside, and the character of the transaction will be considered. *McKissock v. Groom*, 148 Mo. 459 (50 S. W. Rep. 115). Particular cases in which the evidence was held sufficient to authorize the cancellation of a deed on account of undue influence: Deed from parent to child, *Brummond v. Krause*, 8 N. Dak. 573 (80 N. W. Rep. 686); *Forrestel v. Forrestel*, 110 Ia. 614 (81 N. W. Rep. 797); *Todd v. Sykes*, 97 Va. 143 (33 S. E. Rep. 517). Particular evidence held insufficient to show that a deed was obtained by undue influence. *Whitten v. McFall*, 122 Ala. 619 (26 So. Rep. 131); *Maney v. Morris*, Tenn. (57 S. W. Rep. 442); *Fairchild v. Fairchild*, N. J. Eq. (44 Atl. Rep. 944); *Kellogg v. Peddicord*, 181 Ill. 22 (54 N. E. Rep. 623). A deed by a wife to procure the release of her husband from a criminal prosecution on a false charge, executed to a third party who commenced such proceedings and on account of his false representations as to the guilt of the husband, will be cancelled. *Treadwell v. Torbert*, 122 Ala. 297 (25 So. Rep. 216). For an extensive discussion as to what constitutes duress, see *Galusha v. Sherman*, 105 Wis. 263 (81 N. W. Rep. 485). For particular cases in which the evidence was held insufficient to show that a deed was obtained by duress, see *Galt v. Provan*,



108 Ia. 561 (79 N. W. Rep. 357); *Gard v. Arnold*, 157 Mo. 538 (57 S. W. Rep. 1035).

**Sec. 153. Cancellation of conveyances between persons occupying fiduciary relations—Burden of proof.** A conveyance from mother to son for a reasonable consideration which is not shown to have been procured by fear, coercion, importunity or an improper appeal to her affections will not be set aside by a court of equity. *Marking v. Marking*, 106 Wis. 292 (82 N. W. Rep. 133). Where several persons constituting a committee engaged in a public enterprise own real estate, a conveyance of it to one of their number procured by him through a third person shamming an acceptance of the option given to him for its purchase, will be set aside where the result of the transaction is highly profitable to the grantee at the expense of those with whom he is collaborating. *Frolich v. Seacord*, 180 Ill. 85 (54 N. E. Rep. 286). One who assumes the care of an extremely aged person, of feeble strength, and failing memory, who is so dependent that she cannot safely be permitted to be alone, is bound to deal with the weaker party with absolute candor and fairness, and to protect her interests; and the care-taker will not be allowed to receive a benefit obtained by inducing or permitting the weaker party to act under beliefs known to the care-taker to be false. A deed obtained by the care-taker from the weaker party, where the only substantial consideration is an agreement to support, will not be sustained where there is evidence that the grantor was induced by a false belief to make the deed, with the knowledge or contrivance of the grantee, and where the agreement to support does not appear on the face of the deed, and is so under the control of the grantee that she may, at her option, avoid it. *Hammell v. Hyatt*, 59 N. J. Eq. 174 (44 Atl. Rep. 953). Particular evidence held sufficient to authorize the cancellation of a deed by an aged and infirm woman to her sons who had control of her business affairs. *Talbott v. Bedford*, Ky. (53 S. W. Rep. 294; 21 Ky. Law Rep. 897). Where the parties to a deed sustain the relation of parent and child the burden of proof is on the grantee to show the good faith of the transaction. *Todd v. Sykes*, 97 Va. 143 (33 S. E. Rep. 517). A daughter receiving a deed from her parents when feeble from age and illiterate, and when the relation of confidence and trust existed between them by reason

of their dependency on her, has the burden of showing the fairness of the transaction. *Brummond v. Krause*, 8 N. Dak. 573 (80 N. W. Rep. 686). A conveyance by a dissipated spendthrift son of all his property to his mother, in consideration of her paying him a certain sum annually, will not be presumed to have been fraudulently procured on account of the fiduciary relation, but proof of fraud will be required as in other cases. *In re Coleman's Estate*, 193 Pa. St. 605 (44 Atl. Rep. 1085).

**Sec. 154. Quitclaim deeds.** One taking a quitclaim deed from the holder of a tax title cannot recover the consideration paid upon failure of the title, although both parties acted in good faith, believing that the deed conveyed a valid title. *Thorkildsen v. Carpenter*, 120 Mich. 419 (79 N. W. Rep. 636). The court say: "Where one took a quitclaim deed, and was evicted by an older and better title, held, that he cannot recover the price paid. *Soper v. Stevens*, 14 Me. 133. Where both parties acted under the belief that the quitclaim deed conveyed a valid title, and the title wholly failed, held, that the grantee could not recover back, 'for the parties to deeds know that a warranty is required to hold the seller to warrant the title, and they regulate their contracts accordingly.' *Earle v. De Witt*, 6 Allen, 520, cited and approved in *Tucker v. White*, 125 Mass. 346. Chancellor Kent held: 'The vendor [of land] selling in good faith is not responsible for the goodness of his title beyond the extent of his covenants.' *Gouverneur v. Elmendorf*, 5 Johns Ch. 79. See, also, *Stoddard v. Prescott*, 58 Mich. 542 (25 N. W. Rep. 508); *Barkhamsted v. Case*, 5 Conn. 528 (13 Am. Dec. 92); *Clark v. Sigourney*, 17 Conn. 511."

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## FORM OF DEEDS.

[In Vol. I, §§ 57-105; Vol. II, §§ 133-147; Vol. III, §§ 181-197; Vol. IV, §§ 156-168; Vol. V, §§ 162-179; Vol. VI, §§ 190-211; Vol. VII, §§ 147-164, will be found a compilation of the statutory forms of deeds and acknowledgments for the several states and territories. Below we give such amendments, changes and additional constructions as have been made.]

**Sec. 155. Alabama.**

(See Vol. I, § 57; Vol. II, § 133; Vol. III, § 181; Vol. V, § 162; Vol. VII, § 147.) Particular instrument held sufficient as a deed, under Code, § 983. *Sharpe v. Hyman*, 123 Ala. 105 (26 So. Rep. 289). It is not necessary that the character of the signature of witnesses be designated as such by the use of the word "Attest" or "Witness," where it clearly appears from the instrument that the only purpose for which the names were written was to attest the signature of the grantor. *Arrington v. Arrington*, 122 Ala. 510 (26 So. Rep. 152). A certificate of acknowledgment which does not certify that the grantor was informed of the contents of the conveyance or that he voluntarily signed the same, is void. *Stamphill v. Bullen*, 121 Ala. 250 (25 So. Rep. 928). The presumption that an officer authorized to take acknowledgments acts regularly and within the limits of his territorial jurisdiction, will sustain a certificate of acknowledgment the venue of which is designated only by giving the name of the officer's state, where the court has judicial notice of his official character and of his term of office. *McCarver v. Herzberg*, 120 Ala. 523 (25 So. Rep. 3). Citing, *Carpenter v. Dexter*, 8 Wall. 528; *Rackleff v. Norton*, 19 Me. 274; *Bradley v. West*, 60 Mo. 33; *People v. Snyder*, 41 N. Y. 397.

**Sec. 156. California.**

(See Vol. I, § 60; Vol. II, § 135; Vol. III, § 183; Vol. IV, § 157; Vol. V, § 164; Vol. VII, § 148.) Civ. Code, § 1185, is amended so as to read: "The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the person who executed it on behalf of such corporation." Statutes and Amendments to the Codes 1901, p. 396, § 241. Civ. Code, § 1189, is amended so as to read: "The certificate of acknowledgment, unless it is otherwise in this article provided, must be substantially in the following form:

State of ....., County of ....., ss:

On this ..... day of ....., in the year ....., before me (here insert the name and quality of the officer), personally appeared ....., known to me (or proved to me on the oath of .....) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (she or they) executed the same. Provided, however, that any acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state; provided, further, that the certificate of the clerk of a court of record of the county or district where such acknowledgment is taken, that the officer certifying to the

same is authorized by the law so to do, and that the signature of the said officer to such certificate is his true and genuine signature, and that such acknowledgment is taken in accordance with the laws of the place where the same is made, shall be prima facie evidence of the facts stated in the certificate of said clerk." Statutes and Amendments to the Codes, 1901, p. 397, § 242. Civ. Code, § 1190, is amended so as to read: "The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

State of ....., County of ....., ss:

On this ..... day of ....., in the year of ....., before me (here insert the name and quality of the officer), personally appeared ....., known to me (or proved to me on the oath of ..... ) to be the person (or officer) who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same." Statutes and Amendments to the Codes, p. 397, § 243.

#### Sec. 157. Connecticut.

(See Vol. I, § 62; Vol. IV, § 158; Vol. V, § 165; Vol. VI, § 192.) For statute legalizing deeds defectively acknowledged, see Laws 1901, p. 1368. Deeds between husband and wife, and by wife without joinder of husband or attested by one witness or witnessed by wife of grantor or grantee are legalized. Laws 1901, p. 1369.

#### Sec. 158. Florida.

(See Vol. I, § 65; Vol. II, § 136; Vol. III, § 185.) A certificate of a married woman's acknowledgment to a conveyance of her separate property to the effect "that she signed the same freely, and relinquished all dower and right of dower," does not comply with Rev. Stat., § 1958, requiring a married woman's certificate of acknowledgment to a conveyance of her separate real estate to show that she "executed the same freely and without compulsion, constraint, apprehension, or fear of or from her husband." *Durham v. Stephenson*, 41 Fla. 112 (25 So. Rep. 284).

#### Sec. 159. Georgia.

(See Vol. I, § 66; Vol. II, § 137; Vol. III, § 186; Vol. IV, § 159; Vol. VI, § 193; Vol. VII, § 140.) Code, § 3621, is amended so as to read: "To authorize the record of a deed to realty or personalty, when executed out of the state, the deed must be attested by or acknowledged before a commissioner of deeds for the state of Georgia, or a consul or vice-consul of the United States (the certificate of these officers under their seal being evidence of the fact), or by a judge of a court of record in the state where executed, with a certificate of the clerk under the seal of such court of the genuineness of the signature of such

judge, or by a clerk of a court of record under the seal of the court, or by a notary public of the state and county where executed, with his seal of office attached, and if such notary has no seal then his official character shall be certified by a clerk of any court of record in the county of the residence of such notary. A deed to realty must be attested by two witnesses, one of whom may be one of the officials aforesaid." Laws 1900, p. 52. For the purpose of admitting to record a deed executed in another state, the attestation of a commissioner of deeds for Georgia in that state, is sufficient without a certificate verifying his identity and official character. *Dodge v. American Freehold Land Mortg. Co.*, 109 Ga. 394 (34 S. E. Rep. 672). In construing Civ. Code, § 2724, providing that a mortgage may be attested by "any notary public or justice of any court in this state," the word "justice" is used as being interchangeable with "judge," and under this provision a judge of the superior court of Georgia has authority to attest mortgages. *Strauss v. Maddox*, 109 Ga. 223 (34 S. E. Rep. 355).

#### **Sec. 160. Idaho.**

(See Vol. I, § 67; Vol. VI, § 194; Vol. VII, § 150.) Under Rev. Stat., § 2935, the word "grant," when used in a conveyance by which an estate of inheritance is to be passed, is a covenant that the estate so conveyed is, at the time of the execution thereof, free from incumbrances done, made, or suffered by the grantor or any person claiming under him. *Warren v. Stoddart*, Ida. (59 Pac. Rep. 540).

#### **Sec. 161. Illinois.**

(See Vol. I, § 68; Vol. IV, § 160; Vol. V, § 167; Vol. VII, § 151.) Under Rev. Stat., ch. 30, § 20, an acknowledgment to a deed executed out of the state is sufficient, where any clerk of a court of record of such state, under his hand and the seal of such court, shall certify that the deed is executed and acknowledged in conformity with the laws of such state; and applying this statute, it is held in case of a certificate of a clerk of a circuit court it will be presumed that such court is a court of record. *Grand Pass Shooting Club v. Crosby*, 181 Ill. 266 (54 N. E. Rep. 913).

#### **Sec. 162. Massachusetts.**

(See Vol. I, § 76; Vol. V, § 170; Vol. VII, § 154.) For exhaustive discussion as to the constitutionality and construction of Laws 1898, ch. 562, and Laws 1899, ch. 131, providing for the registration of land titles, see *Tyler v. Judges of the Court of Registration*, 175 Mass. 71 (55 N. E. Rep. 812; 51 L. R. A. 433).

#### **Sec. 163. Michigan.**

(See Vol. I, § 77; Vol. II, § 139; Vol. III, § 190; Vol. IV, § 161.) During his term of office every senator and representative in the state

legislature is authorized to take acknowledgments. Laws 1901, No. 127, p. 175. A deed not witnessed as required by Comp. Laws, § 8962, is good between the parties. *Fulton v. Priddy*, 123 Mich. 298 (82 N. W. Rep. 65).

#### **Sec. 164. Minnesota.**

(See Vol. I, § 78; Vol. IV, § 162; Vol. V, § 171; Vol. VI, § 195.)

"Deeds for the conveyance of real estate may be substantially in the following form:

The grantor (here insert name or names of the grantor or grantors, and place of residence), for and in consideration of (here insert consideration) in hand paid, conveys and warrants to (here insert the name or names of the grantee or grantees) the following described real estate (here insert description), situate in the county of ....., in the State of Minnesota.

Dated this ..... day of ....., A. D. ....

Every deed in substance in the above form, when otherwise fully executed, shall be deemed and held a conveyance in fee simple, to the grantee, his heirs and assigns, with covenants on the part of the grantor, (1) that at the time of making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all encumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same. And such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at length in such deed." Laws 1901, ch. 197, § 1.

"Quitclaim deeds may be in substance in the following form:

The grantor (here insert the name or names of the grantor or grantors and place of residence), for the consideration of (here insert consideration), conveys and quitclaims to (here insert the name or names of the grantee or grantees) all interest in the following described real estate (here insert description), situate in the county of ....., in the State of Minnesota.

Dated this ..... day of ....., A. D. ....

Every deed in substance in the form prescribed in this section, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his heirs and assigns, in fee of all the then existing legal or equitable rights of the grantor, in the premises therein described, but shall not extend to after-acquired title, unless words are added expressing such intention." Laws 1901, ch. 197, § 2.

"Any instrument affecting the title to real estate in any county in this state, that is executed and acknowledged in any other state, territory or district which shall have attached or appended thereto or indorsed thereon a certificate of the secretary of state of the state, territory or district, or of the clerk or other proper certifying officer of a court of record, in the county, district or place within which such acknowledgment was taken under seal of office, that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof, such officer as he is therein represented to be, and was authorized to take acknowledgments in said county, district or place, and that such instrument is executed and acknowledged according to the laws of the state, territory or district in which the same was executed, shall be entitled to record in the county in which the land is situated." Laws 1901, ch. 372. Laws 1901, pp. 348-378, provides for the Torrens system of land transfers in all counties of the state having more than 75,000 inhabitants. The provisions of Minnesota Laws 1883, ch. 99 (Gen. Stat. 1894, §§ 5650, 5651) as to forms of acknowledgment are merely permissible and not mandatory; any form previously good still is sufficient. *Cone v. Nimocks*, 78 Minn. 249 (80 N. W. Rep. 1056).

#### **Sec. 165. Missouri.**

(See Vol. I, § 80; Vol. III, § 192; Vol. VI, § 196; Vol. VII, § 155.)

For an extensive discussion of the statutory provisions of Missouri as to the necessity of a seal to the deed of a private corporation, see *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565 (57 S. W. Rep. 1095). Rev. Stat. 1855, §§ 17, 19; Gen. Stat. 1865, §§ 9, 12, construed and applied—sufficiency of certificate of acknowledgment taken before clerk of inferior court of another state. *Robinson v. Nolan*, 152 Mo. 560 (54 S. W. Rep. 469).

#### **Sec. 166. Nebraska.**

(See Vol. I, § 82; Vol. II, § 140; Vol. III, § 193; Vol. V, § 172; Vol. VI, § 198; Vol. VII, § 156.) Laws 1901, p. 473, provides for the appointment of a commissioner to investigate the present system of transferring land titles, and other systems, including the Torrens system of transferring land titles, and to draft a law to improve the present system of transfer.

#### **Sec. 167. New Mexico.**

(See Vol. I, § 86; Vol. VI, § 200.) Seals are not necessary, and deeds heretofore executed without seals are legalized. Laws 1901, p. 114, §§ 11-13. "Acknowledgments made without the territory but within the United States may be made before either: (1) a clerk of some court of record having a seal; (2) a commissioner of deeds duly appointed under the laws of this territory; (3) a notary public having a seal." Laws 1901, p. 115, § 15.

**Sec. 168. North Dakota.**

(See Vol. IV, § 165; Vol. V, § 174; Vol. VI, § 203; Vol. VII, § 158.) For statute curing defective acknowledgments of deeds, etc., taken and certified before January 1, 1901, see Laws 1901, p. 6.

**Sec. 169. Oklahoma.**

(See Vol. I, § 91; Vol. V, § 176.) Okla Stat. 1893, ch. 21, § 10; ch. 82, § 21, providing different modes of acknowledgment should be construed together, and an acknowledgment in accordance with either is effective and sufficient. A substantial compliance with the statute is all that is required. *Garton v. Hudson-Kimberly Pub. Co.*, 8 Okla. 631 (58 Pac. Rep. 946); *Hess v. Trigg*, 8 Okla. 286 (57 Pac. Rep. 159).

**Sec. 170. Oregon.**

(See Vol. I, § 92; Vol. II, § 142; Vol. VI, § 205.) A new statute has been enacted providing for the registration of land titles. Laws 1901, pp. 438-467.

**Sec. 171. South Dakota.**

(See Vol. VI, § 161.) The acknowledgment to all deeds taken and certified prior to January 1, 1901, and which have been duly recorded, are legalized by Laws 1901, p. 1.

**Sec. 172. Tennessee.**

(See Vol. I, § 87; Vol. VI, § 207; Vol. VII, § 162.) A certificate of a married woman's acknowledgment, made under Shannon's Code, § 3753 (Code 1884, § 2891; Ballards' Law Real Property, Vol. I, § 97), which omits the words "understandingly" and "for the purposes therein expressed," is invalid, although it recites that the contents of the deed was explained to her, and she then declared that she freely and voluntarily executed it. *Roulston v. Darby*, Tenn. (52 S. W. Rep. 318); *Literer v. Huddleston*, Tenn. (52 S. W. Rep. 1003). The certificate of a married woman's privy examination, proper in form, and signed by the proper officer, cannot be attacked on the ground that it is not as full and technical as the statute requires, the defect complained of being a mere irregularity. *Burem v. Winstead*, 103 Tenn. 285 (52 S. W. Rep. 1070). For particular allegations held to show prima facie the insufficiency of a married woman's certificate, see *Fenton v. Bell*, Tenn. (53 S. W. Rep. 984).

**Sec. 173. Texas.**

(See Vol. I, § 98; Vol. II, § 143; Vol. III, § 196; Vol. V, § 178; Vol. VI, § 208; Vol. VII, § 163.) An acknowledgment reading, "Before me \* \* \* personally appeared [the grantor], known to me by introduction by [the grantee] to be the person whose signature was subscribed," etc., was held not invalid because of the words "by introduction



by [the grantee]." Rev. Stat., §§ 4617-4620, construed and applied. *Lindley v. Lindley*, 92 Tex. 446 (49 S. W. Rep. 573). Under Rev. Stat., § 4313, a certificate of a wife's acknowledgment to a deed of the homestead which fails to state that she was known to the officer, or made known to him, and that she executed it for the purpose and consideration therein stated, is insufficient. *Hurst v. Finley*, 22 Tex. Civ. App. 605 (55 S. W. Rep. 388). Particular certificate of acknowledgment of a married woman held sufficient under Pasch. Dig., § 1003. *Johnson v. Thompson*, Tex. Civ. App. (50 S. W. Rep. 105).

#### **Sec. 174. Virginia.**

(See Vol. I, § 101; Vol. II, § 144; Vol. III, § 197; Vol. IV, § 166; Vol. VI, § 209.) The deputy of a county clerk may take acknowledgments. Code 1873, ch. 159, § 8, construed and applied. *Town of Gate City v. Richmond*, 97 Va. 337 (33 S. E. Rep. 615). Construing and applying Code, § 2501, providing that acknowledgments may be taken before a commissioner in chancery of a court of record, it is held that a certificate of acknowledgment showing that the officer taking the acknowledgment was a commissioner for a certain city in a designated state, is sufficient, where it appears that in such state there are no commissioners in chancery except in courts of record. *Hurst v. Leckie*, 97 Va. 550 (34 S. E. Rep. 464; 75 Am. St. Rep. 798).

#### **Sec. 175. Washington.**

(See Vol. I, § 102; Vol. II, § 145; Vol. VI, § 210.) Ballinger's Ann. Codes and Statutes, § 4530—acknowledgments taken without the United States—amended. Laws 1901, p. 65.

#### **Sec. 176. West Virginia.**

(See Vol. I, § 103; Vol. II, § 146; Vol. VII, § 164.) Where the word "convey" is used instead of the word "grant" in a deed otherwise in the statutory form, as provided by Code, ch. 72, § 1, it will be given the same meaning. *Chapman v. Charter*, 46 W. Va. 769 (34 S. E. Rep. 768). A certificate of acknowledgment of a deed conveying real estate by a corporation, which fails to show that the officer or agent executing it was sworn, and deposed to the facts contained in the certificate, as required by Code, ch. 73, § 5, is fatally defective, and does not entitle such deed to be recorded. *Abney v. Ohio Lumber & Mining Co.*, 45 W. Va. 446 (32 S. E. Rep. 256).

#### **Sec. 177. Wyoming.**

(See Vol. I, § 105; Vol. IV, § 168; Vol. VI, § 211.) Deeds executed without the state must bear the signature of a witness to the execution, as required by the laws of Wyoming. *State v. Cowhick*, Wyo. (60 Pac. Rep. 265).

## DEFINITIONS

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### EPITOME OF CASES.

**Sec. 178. What will be treated as real estate—**  
**“Owner” defined.** A rent charge or ground rent is held to be real estate and subject to all its incidents. *Willis’ Ex’rs v. Commonwealth*, 97 Va. 667 (34 S. E. Rep. 460). Until brought to the surface, oil will be treated as real estate. *Carter v. Tyler County Court*, 45 W. Va. 806 (32 S. E. Rep. 216; 43 L. R. A. 725). The word “owner” includes any person who has usufruct, control, or occupation of real estate, whether his interest in it is an absolute fee, or an estate for years under a lease. A tenant for a term of years is an owner of the property, within the general or popular meaning of the word, and he properly may allege himself to be the owner in a complaint in an action of ejectment brought against his landlord. *Parker v. Minneapolis & St. L. R. Co.*, 79 Minn. 372 (82 N. W. Rep. 673).

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## DESCENT

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### EPITOME OF CASES.

**Sec. 179. Adopted children—Statutes construed.** Construing and applying Ind. Rev. Stat. 1894, § 838 (Rev. Stat. 1901, § 838), providing that “after the adoption of such child, such adopted father or mother shall occupy the same position toward such child that he or she would if the natural father or mother,” it is held that the adopted

child of a deceased legatee may take through her adopting parent under a provision in a will that in case of the death of the legatee his or her interest should go to the "children" of such deceased. *Bray v. Miles*, 23 Ind. App. 432 (54 N. E. Rep. 446; 55 N. E. Rep. 510). See opinion for exhaustive review of authorities. Ia. Code, 1873, §§ 2307-2311 construed and applied—execution and acknowledgment of instrument of adoption—recording and indexing. *Hilpire v. Claude*, 109 Ia. 159 (80 N. W. Rep. 332; 46 L. R. A. 171; 77 Am. St. Rep. 524). A child duly adopted under Mo. Rev. Stat. 1889, § 968, is a child capable of inheriting within the meaning of § 4518, giving a widow the right to one-half of the estate left by her husband on his dying "without any children or other descendants in being capable of inheriting." *In re Moran's Estate*, 151 Mo. 555 (52 S. W. Rep. 377); *Moran v. Moran*, 151 Mo. 558 (52 S. W. Rep. 378). N. Dak. Civ. Code, ch. 8, relating to the adoption by adult persons of minor children other than their own by the procedure therein provided, requires that the persons adopting be residents of the state. *Eddie v. Eddie*, 8 N. Dak. 376 (79 N. W. Rep. 856; 73 Am. St. Rep. 765). N. Y. Laws 1873, ch. 830, amended by Laws 1887, ch. 703, construed and applied—adoption of children—proof of adoption. *Hilton v. Ernst*, 161 N. Y. 226 (55 N. E. Rep. 1056). Shannon's Tenn. Code, §§ 5402, 5409-5411 construed and applied—proceedings to adopt child—conclusiveness of decree. *Crocker v. Balch*, 104 Tenn. 6 (55 S. W. Rep. 307).

**Sec. 180. Adoption of adult as a child—Formal requisites of instrument of adoption.** One more than twenty-one years of age may be adopted as a child, under Mo. Rev. Stat., § 968. *In re Moran's Estate*, 151 Mo. 555 (52 S. W. Rep. 377). The court say: "The statute uses the word 'child' in the sense of its relation to the word 'parent,' and in the capacity of heir. It provides that, upon the execution of the deed of adoption, the child shall have the same rights in relation to the person adopting it as it would have in relation to its own parents. The intention of the statute is to enable a person to bestow upon the object of his favor the attribute that the law bestows on one's own offspring, and to establish as nearly as possible

the relation of parent and child. The word 'child' in relation to the word 'parent,' gives no suggestion as to age, and that is the sense in which it is used in the statute. The law has placed no limitation as to the age of the child to be adopted, and there is no reason why such a restriction should be placed on the choice of the adopting parent."

Construing and applying Mo. Rev. Stat., §§ 968, 969, providing that a deed of adoption shall be executed and acknowledged the same as a conveyance of real estate, and that a married woman may join with her husband in a deed of adoption, it is held that a deed of adoption purporting to be executed by a husband and wife, the certificate of acknowledgment to which recites "personally appeared N. J. S. and S. E. S., his wife, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed," is void because it appears from such certificate that he alone acknowledged the deed to be his free act and deed, and does not show that she acknowledged it to be her act. *Sarazin v. Union R. Co.*, 153 Mo. 479 (55 S. W. Rep. 92). The court say: "Adoption is in derogation of the common law, and purely of statutory enactment, and, like all other similar statutes, must be strictly complied with. Thus, in *Ex parte Clark*, 87 Cal. 638 (25 Pac. Rep. 967), it is said: 'The right of adoption is purely statutory. It was unknown to the common law, and as the right, when acquired under our statute, operates as a permanent transfer of the natural rights of the parent, it is repugnant to the principles of the common law; and one who claims that such a change has occurred must show that every requirement of the statute has been strictly complied with. It cannot be said that one condition is more important than another.' *Tyler v. Reynolds*, 53 Ia. 146 (4 N. W. Rep. 902); *Shearer v. Weaver*, 56 Ia. 578 (9 N. W. Rep. 907); *Keegan v. Geraghty*, 101 Ill. 26; *Furgeson v. Jones*, 17 Or. 204 (20 Pac. Rep. 842; 3 L. R. A. 620; 11 Am. St. Rep. 808)."

**Sec. 181. Bastards and children of slaves—Statutes construed.** The right of an illegitimate child to inherit from its parents does not extend to the estates of either

lineal or collateral kindred of either parent. *Eddie v. Eddie*, 8 N. Dak. 376 (79 N. W. Rep. 856; 73 Am. St. Rep. 765). Ala. Code, § 1460 construed and applied—descent of property from illegitimate child. *Ward v. Mathews*, 122 Ala. 188 (25 So. Rep. 50). The right of a surviving husband, wife or child of an illegitimate to inherit from him, given by Ill. Rev. Stat., ch. 39, § 2, does not extend to collateral kindred. *Hudnall v. Ham*, 183 Ill. 486 (56 N. E. Rep. 172; 48 L. R. A. 557; 75 Am. St. Rep. 124). Starr & C. Ann. Ill. Stat., ch. 39, § 2 construed and applied—descent of real estate of an illegitimate dying intestate without heirs. *Meadowcroft v. Winnebago Co.*, 181 Ill. 504 (54 N. E. Rep. 949). In Iowa it is held that children of an illegitimate who is entitled to inherit may inherit through her. *Johnson v. Bodine*, 108 Ia. 594 (79 N. W. Rep. 348). Ia. Code, § 3385 (Code 1873, § 2466) construed and applied—sufficiency of proof of recognition of illegitimate children in order to entitle them to inherit. *Markey v. Markey*, 108 Ia. 373 (79 N. W. Rep. 258); *Watson v. Richardson*, 110 Ia. 673 (80 N. W. Rep. 407). A child begotten before but born after a void marriage between its parents is held legitimate, under Ky. Stat., § 2098, providing that “the issue of an illegitimate or void marriage shall be legitimate.” *Swinney v. Klippert*, Ky. (50 S. W. Rep. 841; 20 Ky. Law Rep. 2014). Construing and applying Ky. Gen. Stat., ch. 31, § 5, providing that “bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother,” and Stat., § 463, providing that “the word ‘issue’ as applied to the descent of real estate, shall be construed to include all the legal lineal descendants of the ancestor,” it is held that the bastard child of the daughter of a testator to whom he has devised real estate will take such devise as her “issue,” under Stat., § 4841, in case of her death before that of the testator. *Cherry v. Mitchell*, Ky. (55 S. W. Rep. 689; 21 Ky. Law Rep. 1547). Me. Laws 1887, ch. 14 construed and applied—inheritance of illegitimates. *Lawton v. Lane*, 92 Me. 170 (42 Atl. Rep. 352). In order for the acts of a father to effect the adoption by him of his illegitimate child, under N. Dak. Rev. Codes, § 2806, he must reside in the state when they occur. *Eddie v. Eddie*, 8 N. Dak. 376 (79 N. W. Rep. 856; 73 Am. St.

Rep. 765). Construing and applying Shannon's Tenn. Code, § 4169, providing that "where any woman shall die intestate, having a natural born child or children, whether she also have a legitimate child or children, or otherwise, such natural born child or children shall take, by the general rules of descent and distribution, equally with the other child or children, the estate real or personal of his or her and their mother; and should either of such children die intestate, without child, his or her brothers and sisters shall, in like manner, take his or her estate," it is held that an illegitimate brother shares equally with his legitimate sisters in the estate of a deceased legitimate sister, who died intestate without leaving husband or children, and who acquired her estate by deed from her husband. *Laughlin v. Johnson*, 102 Tenn. 455 (52 S. W. Rep. 816). The written acknowledgment of the paternity of an illegitimate child by the father thereof in order to entitle it to inherit from him, required by 1 Bal. Ann. Wash. Codes, § 2806, need not be made by him for the purpose of admitting such child to heirship, but a collateral written acknowledgment is sufficient. *In re Rohrer*, 22 Wash. 151 (60 Pac. Rep. 122; 50 L. R. A. 350).

For an exhaustive discussion of the rights of children of slave marriages under the statutes of Florida, see *Adams v. Sneed*, 41 Fla. 151 (25 So. Rep. 893). Ky. Laws 1865-66, p. 37 (Act Feb. 14, 1866) construed and applied—inheritance by parties to slave marriage and rights of their children. *Botts v. Botts*, Ky. (56 S. W. Rep. 677; 56 S. W. Rep. 961); *Lewis v. King*, 180 Ill. 259 (54 N. E. Rep. 330).

**Sec. 182. Descent to surviving wife—Statutes construed.** Cal. Code Civ. Proc., § 1469 construed and applied—assignment of decedent's estate to widow and minor children for their support. *Mcguire v. Lynch*, 126 Cal. 576 (59 Pac. Rep. 27). Ind. Rev. Stat. 1881, §§ 2483, 2487 (Rev. Stat. 1901, §§ 2640, 2644); Laws 1889, p. 430; Laws 1899, p. 131, construed and applied—descent to second or subsequent childless widow—right of husband's children by former wife—force and effect of conveyances by. *Burget v. Merritt*, 155 Ind. 143 (57 N. E. Rep. 714); *Thompson v. Henry*, 153 Ind. 56 (54 N. E. Rep. 109); *Johnson v.*

Johnson, 153 Ind. 60 (54 N. E. Rep. 124); McNally v. White, 154 Ind. 163 (54 N. E. Rep. 794). Under Mass. Pub.Stat., ch. 124, § 3, a widow of an intestate who leaves no issue living, in addition to her estate in lieu of dower, has the right to take of his real estate in fee an amount not exceeding \$5,000 in value. Brownell v. Briggs, 173 Mass. 529 (54 N. E. Rep. 251). Me. Laws 1897, ch. 196 gives a widow, free from payment of her husband's debts, one-third of the real estate of which he was seized during coverture, in fee. Longley v. Longley, 92 Me. 395 (42 Atl. Rep. 798). A widow, who, instead of having her dower right in her husband's real estate assigned to her, continues to occupy the real estate with his children or heirs, as provided by How. Ann. Mich. Stat., § 5744, thereby does not become a life tenant, but a tenant in common with them; nor is she chargeable with rent of such premises except such as was received from others, and she is not liable to an action for use and occupancy and cannot charge such estate with taxes paid and repairs made by her during such occupancy. Graff v. Graff, 123 Mich. 456 (82 N. W. Rep. 248). Utah Rev. Stat. 1898, §§ 2731, 2826-2829 construed and applied—rights of surviving wife—power of husband to dispose of property by will. *In re Little*, Utah (61 Pac. Rep. 899). Particular acts on the part of a widow held not to amount to an election to take her homestead rights in her deceased husband's land instead of her distributive share. McDonald v. Young, 109 Ia. 704 (81 N. W. Rep. 155).

**Sec. 183. Widow's right of quarantine.** The possession of a widow under her right of quarantine is not adverse to her husband's heirs. Reuter v. Stuckart, 181 Ill. 529 (54 N. E. Rep. 1014). The quarantine rights given to a widow by Mo. Rev. Stat. 1889, § 4533, are not dependent upon her residing in the mansion house of her husband at the time of his death. King v. King, 155 Mo. 406 (56 S. W. Rep. 534).

**Sec. 184. Rights of creditors against heirs.** Heirs and devisees who have received the real property of an estate are not liable for the debts of the estate unless the personal property is insufficient to pay them. Steiner v.

Steiner Land & Lumber Co., 120 Ala. 128 (26 So. Rep. 494). Ky. Civ. Code, §§ 433, 434 construed and applied—liability of legatees and distributees for debts of decedent—effect of creditor's failure to present claim against estate. *Benson v. Simmers*, Ky. (53 S. W. Rep. 1035; 21 Ky. Law Rep. 1060). 2 N. J. Gen. Stat., p. 1679 construed and applied—action by creditor of decedent against his heirs or devisees—procedure. *Newark Lime & Cement Mfg. Co. v. Harrington*, 62 N. J. L. 632 (42 Atl. Rep. 417).

Under Pa. Laws 1834, Act, Feb. 24, unsecured debts of a decedent do not continue a lien on his realty longer than five years after his death, unless action to enforce them is commenced within that time. *Commonwealth v. Cooper*, 192 Pa. St. 424 (44 Atl. Rep. 43).

#### **Sec. 185. Miscellaneous notes—Statutes construed.**

When the lands of an intestate descend to his children, there being no personal estate for distribution, the interest of each child in the lands is subject to his indebtedness to the intestate. *Keever v. Hunter*, 62 O. St. 616 (57 N. E. Rep. 454). Heirs of a testator consisting of children and grandchildren of his deceased brothers and sisters take per stirpes and not per capita, under a devise to his two brothers for life, with remainder to be "divided between my heirs at law." *Johnson v. Bodine*, 108 Ia. 594 (79 N. W. Rep. 348). The surviving party to a marriage prohibited on account of consanguinity, and which the statute declares to be "absolutely void without any decree of divorce or other legal process," does not by such marriage acquire any interest in the other's property. *Hayes v. Rollins*, 68 N. H. 191 (44 Atl. Rep. 176). A widow's release by an antenuptial contract of all her claims on the estate of her husband, in consideration of a specified sum, will not preclude her from being deemed his widow, so as to confer a right of inheritance upon others which is dependent upon the intestate dying without leaving a widow. Ill. Rev. Stat., ch. 30, § 2, subd. 4 construed and applied. *Hudnall v. Ham*, 183 Ill. 486 (56 N. E. Rep. 172; 48 L. R. A. 557; 75 Am. St. Rep. 124). For an exhaustive review of Tennessee cases on the subject of allowing interest on advancements of lands, see *Wysong v. Rambo*, Tenn. (56 S. W. Rep. 1053; 49 L. R. A. 766). A statute (Cal. Code Civ. Proc., § 1678) authorizing the distribution of the real estate of a decedent to the grantees of the



heirs or devisees, does not give a mortgagee of a devisee a right to have allotted to him such devisee's share. In *re Crooks' Estate*, 125 Cal. 459 (58 Pac. Rep. 89). Ga. Civ. Code, § 3354 construed and applied—descent of wife's separate estate to surviving husband and minor children. *Payton v. Monroe*, 110 Ga. 262 (34 S. E. Rep. 305). Ky. Gen. Stat., ch. 31, §§ 3, 9 construed and applied—inheritance of infant's estate by brothers and sisters of the half blood. *King v. Middlesborough Town-Lands Co.*, Ky. (50 S. W. Rep. 37; 20 Ky. Law Rep. 1859).

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## DESCRIPTION OF REAL ESTATE

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### EPITOME OF CASES.

**Sec. 186. Sufficiency of description—General principles and particular cases.** A judgment enjoining a trespass upon land and adjudging the land to plaintiffs should describe the land so that it may be identified without reference to any other paper. *Wallace v. Friend*, Ky. (49 S. W. Rep. 181; 20 Ky. Law Rep. 1270). The same rule applies to a verdict in ejectment. *Benne v. Miller*, 149 Mo. 228 (50 S. W. Rep. 824). A description of land embraced in a conveyance, as all the lands the grantor "holds on the Dry Fork of Otter Creek," is not void for uncertainty. *Albertson v. Prewitt*, Ky. (49 S. W. Rep. 196; 20 Ky. Law Rep. 1309). A description in a complaint and decree to foreclose a vendor's lien as: "Beginning at the south corner of the J. W. Beckham 160-acre tract, in said league; thence south 45 W., 906 varas, with S. E. Boundary line of said league, to a stake and mound in prairie; thence north 45 W., with the first division line of said league, 555 varas, to J. J. Sample's E. corner; thence S., 45 E., 550 varas, to the place of beginning,—containing 87¾ acres of land, more or less," was held sufficient, on the ground that the mistake therein could be remedied by supplying the omitted line. *Mansel v. Castles*, 93 Tex.

414 (55 S. W. Rep. 559). A devise by a testator of all the land he owns in a designated section of a given township and range which are stated correctly, as is also the number of acres, is sufficient, although he erroneously describes the land as being in the northwest quarter of such section when it is in the southwest quarter. *Zirkle v. Leonard*, 61 Kan. 636 (60 Pac. Rep. 318). For particular descriptions held sufficient, see *Carter v. Clark*, 92 Me. 225 (42 Atl. Rep. 398); *McGuigan v. Hennessy*, 24 Mont. 202 (61 Pac. Rep. 1); *Lane v. Queen City Milling Co.*, 66 Ark. 646 (50 S. W. Rep. 274); *Schuster v. Myers*, 148 Mo. 422 (50 S. W. Rep. 103); *Inge v. Demouy*, 122 Ala. 169 (25 So. Rep. 228).

A description in a deed as beginning at a stake and which does not fix any single corner in the description by anything more definite than "a stake," is insufficient. *Barker v. Southern Ry. Co.*, 125 N. C. 596 (34 S. E. Rep. 701; 74 Am. St. Rep. 658). A description in a tax deed as "a lot of land containing five acres, or thereabouts, situated on the easterly side of Bay View Street, at Camden village, within the town of Camden aforesaid, on Ogier's Point, so called," was held insufficient, *Green v. Alden*, 92 Me. 177 (42 Atl. Rep. 358); and so was a description in a tax deed as "a part of the west  $\frac{1}{2}$  of the southeast  $\frac{1}{4}$  of section 21, township 25 north, 3 west, containing 4 acres," *Armstrong v. Huty*, Ind. (55 N. E. Rep. 443). A deed describing the land conveyed as "three and five hundredths (3.05) acres in unplatted lands of Gurdon, situated on the east side of the southwest quarter of southwest quarter of section 28, township 9 south, range 20 west," without reference to any plat, record or boundary by which the land might be located, is void for uncertainty. *Cooper v. Newton*, Ark. (56 S. W. Rep. 867). For particular description in a mortgage and execution thereunder held too uncertain, see *Osborne v. Rice*, 107 Ga. 281 (33 S. E. Rep. 54).

**Sec 187. Construction of descriptions.** A description by metes and bounds cannot be controlled by reference to a description contained in another instrument. *Muto v. Smith*, 175 Mass. 175 (55 N. E. Rep. 1041). In cases where parts of the description of the premises sought to be conveyed are inconsistent with other parts, but enough of them are sufficiently certain, under reasonable rules of construction, to locate

the property which the parties intended to convey, the repugnant elements of the description will be rejected as surplusage, and the instrument construed to convey the premises falling within the consistent elements of the description. *Heinselman v. Hunsicker*, 103 Wis. 12 (79 N. W. Rep. 23); *Gibney v. Fitzsimmons*, 45 W. Va. 334 (32 S. E. Rep. 189); *Johnson v. Bowlware*, 149 Mo. 451 (51 S. W. Rep. 109). In the case of *McKinney v. Doane*, 155 Mo. 287 (56 S. W. Rep. 304), the supreme court of Missouri say: "The general rule, if not the universal doctrine, is that where there is no description of land conveyed by deed, other than by the number of the lot or block in the survey of a tract of land, or the plat of a town or an addition thereto, the authentic map of such survey is as much a part of the deed as though set out in it." Where a will devising a tract of land to S. and F. describes the part devised to S. as "the portion of land upon which she now lives, consisting of 145 acres," and that devised to F. as "the remaining portion consisting of 155 acres, and being the portion upon which I now reside," it is held that S. is entitled to 145 acres off the end of the tract on which she lives, and that F. takes the remainder of the land, although it contains more than 155 acres. *Cundiff v. Seaton*, Ky. (49 S. W. Rep. 179; 20 Ky. Law Rep. 1271). For construction of particular descriptions, see, as to the location of a highway, *Taft v. Emery*, 174 Mass. 332 (54 N. E. Rep. 864); as to conflicting calls, *Airy v. Kunkle*, 190 Pa. St. 196 (42 Atl. Rep. 533).

**Sec. 188. Evidence in aid of descriptions.** Parol evidence always is admissible to locate the monuments and boundaries in a deed, *Carter v. Clark*, 92 Me. 225 (42 Atl. Rep. 398); *Bartlett v. La Rochelle*, 68 N. H. 211 (44 Atl. Rep. 302); and to identify the land embraced in a particular description, *Lee v. Stone*, 21 R. I. 123 (42 Atl. Rep. 717). In Alabama it is held that parol evidence is admissible to identify land intended to be described by a description in a mortgage as "the east half of the southeast fourth of section thirteen, township thirteen, range four east," although no state or county is given. *Baron v. Barron*, 122 Ala. 194 (125 So. Rep. 55). A description as "Thence southeasterly 98.70 feet to a point distant 137 feet westerly from said Madison St. 112 feet to said first-mentioned land of O'Donnell" is held to show on its face the omission of the word "thence" between the abbrevi-

ated word "St." and the figures "112," and extrinsic evidence is admissible to apply the description. *Muto v. Smith*, 175 Mass. 175 (55 N. E. Rep. 1041). A description of land in a contract of sale as so many acres in a given state and county, adjoining the land of a designated third person and the land of the vendor, is sufficient to admit parol evidence to identify the land. *Edwards v. Deans*, 125 N. C. 59 (34 S. E. Rep. 105). Where a sufficient description is given in a contract for the sale of land, parol evidence may be resorted to in order to fit the description to the thing, but where an insufficient description is given, of where there is no description, such evidence is inadmissible; but the court never will receive parol evidence both to describe the land, and then to apply the description. *Ferguson v. Blackwell*, 8 Okla. 489 (58 Pac. Rep. 647). The legal effect of the conveyance of land bounded by a stream of water cannot be varied or controlled by parol testimony, *Ballance v. City of Peoria*, 180 Ill. 29 (54 N. E. Rep. 428); but where a conveyance of land designates one boundary thereof as the bank of a mill race which has two banks—one which immediately forms the race and one thrown up to prevent the overflow of water from the race—parol evidence is admissible to show which bank was meant by the description in the deed, *Stamphill v. Bullen*, 121 Ala. 250 (25 So. Rep. 928). A judgment for partition, excepting from the land to be sold a half of an acre in a certain quarter-section, so laid out as to include the family graveyard of M., is not void for uncertainty of description with respect to the half acre, though no graveyard was located in said quarter-section, where the family graveyard of M., containing half of an acre, can be located by parol in another quarter-section. *Turner v. Dixin*, 150 Mo. 416 (51 S. W. Rep. 725). For particular description held sufficient on account of its being capable of being made certain by extrinsic evidence, see *Pierson v. Sanger*, 93 Tex. 160 (53 S. W. Rep. 1012).

# EASEMENTS

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## EPITOME OF CASES.

**Sec. 189. Creation by grants.** A subsequent grantee of land subject to an easement created by a prior grant of his grantor takes the estate subject only to the easements created expressly or by implication from the terms of the grant, or such other easements as were apparent from an inspection of the premises. *Edwards v. Haeger*, 180 Ill. 99 (54 N. E. Rep. 176). An easement in gross will never be presumed when it can be fairly construed to be appurtenant to some other estate. A right of way is appurtenant to the land of the grantee if so in fact, although not declared to be so in the deed. Whether such an easement is in gross or appurtenant to some other estate may be determined by the relation of the easement to such estate, and in the light of all the circumstances under which it was granted. The facts that such an easement was intended for the benefit of the grantee's land, and to be used in connection with its occupancy, and has been so used, and it was useless for any other purpose, will overcome any presumption that it was intended to be in gross that might otherwise arise from the absence of the words "heirs and assigns." *Lidgerding v. Zingnego*, 77 Minn. 421 (80 N. W. Rep. 360; 77 Am. St. Rep. 677). See opinion for construction of particular grant of an easement for a way.

**Sec. 190. Creation by reservation—Location of way.** In Massachusetts a reservation of a way by a deed does not operate beyond the life of the grantor, in the absence of the word "heirs." *Simpson v. Boston & M. R. R.*, 176 Mass. 359 (57 N. E. Rep. 674). A deed of warranty conveying a parcel of land by metes and bounds, "with the reservation of a road two rods wide over the northerly side of said lot," reserves an easement only, and the fee passes to the grantee. *Wellman v. Churchill*, 92 Me. 193 (42 Atl. Rep. 352). Where owners in common of land,

upon partition thereof, reserve a portion as an alley way for their joint use until otherwise mutually agreed, a permanent appurtenant easement thereby is created, and either party may have a perpetual injunction against the other interfering with his use of the way. *Yeager v. Manning*, 183 Ill. 275 (55 N. E. Rep. 691). When the grantor reserves in a coal lease "the right of way for any railroads or wagonroads that may be required for the further development of any of the property of the lessor" over and through the leased premises, and in the lease it is provided that "the buildings and other improvements to be erected by the lessee shall be so located and constructed as to preserve proper and convenient entries to and from the C. & O. Ry. Co., or other railroad company's tracks, to which the lessors may grant permission through, over, and across said track,—the location of such railroad, if reasonably convenient, to be determined before said improvements are erected,"—the selection of the route is for the owner of the way; but he cannot make it in an unreasonable place, when it would cause unnecessary injury to the lessee. *McKell v. Collins Colliery Co.*, 46 W. Va. 625 (33 S. E. Rep. 765).

**Sec. 191. Construction of grant of easement to construct ditches.** A grant of an easement in land to construct ditches in the wet portions thereof to supply water for a mill does not preclude a subsequent grantee of the land from sinking a well on the hard dry portion thereof, although it has the effect of intercepting percolating water which otherwise would reach the wet land. *Edwards v. Haeger*, 180 Ill. 99 (54 N. E. Rep. 176). The court say: "Moreover, it is unreasonable to believe the original parties to the grant intended that the easement should extend to the water percolating or seeping through the high and dry portions of the premises. Such an intention would result in the conversion of practically the entire tract to the use of the mill, and would tend largely to prevent the improvement thereof, and in a great degree destroy its usefulness. The nature and tendency of such a burden upon land is so far opposed to the public good as that a grant should not be construed to create it unless language is employed which will not admit, reasonably, of any other

construction. Deeds containing reservations of the privilege of taking water from springs, or granting the privilege of drawing water from wells, have uniformly been held to confer no right in water which naturally seeped or percolated through the land, though the springs or wells derived their supply of water therefrom; and the doctrine in such instances is well established that the owner of such land may lawfully sink wells, or make other excavations, and collect percolating water which otherwise would feed the springs, or supply the wells. *Davis v. Spaulding*, 157 Mass. 431 (32 N. E. Rep. 650); *Lybe's Appeal*, 106 Pa. St. 626 (51 Am. Rep. 542); *Chesley v. King*, 74 Me. 164 (43 Am. Rep. 569); 27 Am. & Eng. Enc. Law, pp. 430, 431, and notes." For construction of particular easement reserved in a deed, for the construction of ditches, see *Hohenshell v. South Riverside Land and Water Co.*, 128 Cal. 627 (61 Pac. Rep. 371).

**Sec. 192. Creation by prescription.** Continuous and uninterrupted use of a pass way for the prescriptive period, when unexplained, creates a presumption that the use was adverse and gives an easement, *Browning v. Davis*, Ky. (53 S. W. Rep. 9; 21 Ky. Law Rep. 786); but an easement by prescription cannot arise from a mere permissive use, *Moffatt v. Kenney*, 174 Mass. 311 (54 N. E. Rep. 850); *Prescott v. Prescott*, 175 Mass. 64 (55 N. E. Rep. 805); *Murray v. Ealy*, Tenn. (57 S. W. Rep. 412); *Ferdinando v. City of Scranton*, 190 Pa. St. 321 (42 Atl. Rep. 692). An easement for a private way over land of another is not acquired by the use of the same for the prescriptive period, over the objections and interruptions of the owner of the land. *Wooldridge v. Coughlin*, 46 W. Va. 345 (33 S. E. Rep. 233). The right to an easement based upon an adverse use is inchoate merely until the use has continued for the prescriptive period; and such a right does not pass by deed unless specifically mentioned. *Durkee v. Jones*, Colo. (60 Pac. Rep. 618). In support of the last proposition, the court cite, *Spaulding v. Abbot*, 55 N. H. 423; *Swazey v. Brooks*, 34 Vt. 451; *Meek v. Breckenridge*, 29 O. St. 642. In order to establish a highway by prescription the public use must be adverse, uninterrupted, exclusive and under claim of right, *O'Connell v. Chicago*

Terminal Transfer R. Co., 184 Ill. 308 (56 N. E. Rep. 355); and one seeking to establish a prescriptive right to a road must show that during the prescriptive period the servient estate was owned by persons free from legal disability, *City of Austin v. Hall*, 93 Tex. 591 (57 S. W. Rep. 563). A slight deviation of travel from the laid out course of a highway has no effect to change it where the whole of its width was in good repair. *Town of Randall v. Rovelstad*, 105 Wis. 410 (81 N. W. Rep. 819). A highway by prescription over a part of a railroad right of way adjacent to its switches and freight house is not established by showing a permissive use of the same as a passage way by the public and persons having business with the railroad. *Baltimore & O. S. W. Ry. Co. v. City of Seymour*, 154 Ind. 17 (55 N. E. Rep. 953). Particular evidence held insufficient to establish a public highway by prescription. *O'Connell v. Chicago Terminal Transfer R. Co.*, 184 Ill. 308 (56 N. E. Rep. 355). Mass. Stat. 1892, ch. 275, providing that "no right of way across any railroad track or location which is in use for railroad purposes shall hereafter be acquired by prescription; but nothing herein contained shall affect any existing right of way," is held to prevent the acquisition of a right by prescription, whether the adverse use had been begun prior to the passage of the statute or not, and an "existing right of way" means a right which, at the time of the statute, had fully ripened into a right by prescription or otherwise. *Simpson v. Boston & M. R. R.*, 176 Mass. 359 (57 N. E. Rep. 674). Utah Rev. Stat. 1898, § 2860, barring an action or a defense founded upon the title to real property unless it appear that the person seeking to sustain the same or his privies in title have been seized or possessed of the property in question within seven years before the committing of the act in respect to which such action is prosecuted or defense made, has no application to the acquisition of an easement by prescription; and a prescriptive right to an easement can only arise after use and enjoyment for the period of twenty years. *Funk v. Anderson*, Utah, (61 Pac. Rep. 1006).

**Sec. 193. Appurtenant or implied easement.** Appurtenant easements pass with a conveyance of the land without special mention. *Yeager v. Manning*, 183 Ill. 275 (55



N. E. Rep. 691). Where a continuous and apparent servitude is imposed by the owner of one part of the land for the benefit of another, a purchaser of the servient estate at private or judicial sale takes subject to the servitude. *Manbeck v. Jones*, 190 Pa. St. 171 (42 Atl. Rep. 536). A conveyance of a tract of land by deed, together with the free and common use of a basin adjoining it, to load and unload, at all times, without let or hindrance from the grantor, his heirs or assigns, forever, creates an appurtenant easement, and not a mere personal privilege or license, which is apparent and continuous and passes by a subsequent deed from the grantee to his grantee to whom he conveyed "with the appurtenances," without specifically giving the right to use the basin. *International Pottery Co. v. Richardson*, N. J. (43 Atl. Rep. 692). Where each of three buildings owned by the same person has a door and windows opening upon a common alley, a purchaser of one of them may restrain a subsequent purchaser of the other two from changing the construction of his buildings in such a manner as to interfere with the first purchaser's use of the alley as a means of access to his building and to deprive him of light and air. *Irvine v. McCreary*, Ky. (56 S. W. Rep. 966; 49 L. R. A. 417). For particular case in which an appurtenant easement was held not to be created, see *Prescott v. Prescott*, 175 Mass. 64 (55 N. E. Rep. 805).

**Sec. 194. Way of necessity.** One cannot claim a way of necessity over the land of another where, for a small expense, he can make a way equally as good on his own land. *Murray v. Ealy*, Tenn. (57 S. W. Rep. 412). A way of necessity exists where land granted is completely environed by land of the grantor, or partially by his land and the land of strangers. The law implies from these facts that a private right of way over the grantor's lands was granted to the grantee as appurtenant to the estate. *Wooldrige v. Coughlin*, 46 W. Va. 345 (33 S. E. Rep. 233). The conditions which give rise to an implication that a way is granted where none is mentioned must create a strict necessity for the way in order reasonably to use the property, and the right of the way by necessity will continue only so long as the necessity continues; that the way would be convenient and beneficial is not enough. In order

for a grantee to be deprived of a way of necessity over the lands of his grantor, because his lands are accessible by water, it must appear that the waterway is such as can be used at all seasons of the year and can be made available for the transportation to and from the land of all such things as are needed in the use of the land in the ordinary way. *Feoffees of Grammar School v. Proprietors of Jeffery's Neck Pasture*, 174 Mass. 572 (55 N. E. Rep. 462). If a landowner conveys a right of way through his farm in fee to a railroad company, and years afterwards natural gas is found on his lands situated on the farther side of such right of way from his residence, the law will imply a way of necessity by which he may pipe such gas to his residence for use therein; the pipes to be so laid and constructed as not to interfere in any wise with such railroad company's proper use and occupation of its right of way. *Uhl v. Ohio River R. Co.*, 47 W. Va. 59 (34 S. E. Rep. 934). The right to a way of necessity over land conveyed by a grantor, in favor of lands retained by him, which otherwise would exist on the ground of an implied reservation, may be shown to have been waived by a verbal agreement. *Lebus v. Boston*, Ky. (51 S. W. Rep. 609; 47 L. R. A. 79; 21 Ky. Law Rep. 411).

**Sec. 195. Way of necessity—Right of purchaser at foreclosure sale to claim over other lands of the mortgagor.** A purchaser at a sale under a decree of foreclosure may claim a way of necessity over other lands of the mortgagor embraced in the mortgage but not sold because not necessary in order to satisfy the debt, and he may assert the right to a way of necessity over such lands, although a declaration of homestead was filed thereon after the execution of the mortgage and before its foreclosure which, under the statute (Cal. Civ. Code, §§ 1240-1242), could be incumbered or conveyed only by an instrument signed by both husband and wife. *San Joaquin Val. Bank v. Dodge*, 125 Cal. 77 (57 Pac. Rep. 687). The court say: "One of the earliest cases, decided more than one hundred years ago, is *Howton v. Frearson*, 8 Term R. 50. One S. Dalby, a widow, was seized for her life of certain lands in the liberty of Ockbrook, which estate was limited in remainder to her son, J. J. Dalby, in tail. The mother died, and her

said son became entitled to the lands. By the will of the son, certain trustees were appointed for the sale of the lands, and after his death the said trustees sold to the plaintiff in said case three parcels of land, to wit, the 'Allotment,' 'Draycott Field' and 'Carr Close,' and to defendant the 'Upper Meadow.' Soon after defendant's purchase, the owners of other portions of lands purchased at the trustees' sale closed up the way over their lands leading to defendant's lands, the 'Upper Meadow.' The case was argued at length in Trinity term as to whether or not the rule applied to a grant made by trustees. Lord Kenyon entertained great doubt upon the question, and ordered that the case might be argued again at the next term. Upon the calling of court, and before the case was reargued, the learned chief justice said: 'Upon further consideration I find it impossible to distinguish this from the general case where a man grants a close surrounded by his own land (in which case the grantee has a way to it of necessity over the land of the grantor) merely on the ground that the plaintiff conveyed to the defendant in the character of trustee, for it cannot be intended that he meant to make a void grant. There being no other way to the defendant's close but over the land of one of the persons who granted to him, he was entitled to such way of necessity upon the authority of all the cases, upon the principle that every deed must be taken most strongly against the grantor. \* \* \* There are, I think, great difficulties in the question; but, in the other mode of considering the case, those difficulties are gotten rid of altogether, and it falls within all the authorities, which are not controverted even by the plaintiff.' The rule thus laid down by Lord Kenyon has ever since been the rule in England and in this country. In *Collins v. Prentice*, 15 Conn. 38 (38 Am. Dec. 61), it was held to apply by one purchaser against another at probate sale made by executors under order of court, both purchases being made on the same day and as parts of the same estate. In *Pernam v. Wead*, 2 Mass. 202, it was held to apply in favor of a debtor as against a creditor who had taken part of the debtor's land under execution, leaving him no passage to the highway. In *Taylor v. Townsend*, 8 Mass. 410 (3 Am. Dec. 43), it was held to apply in favor of a creditor, as against a debtor, when the creditor had

certain lands set off to him under execution, but no way of reaching them, except on the lands of the debtor not so set apart. In the late case of *Schmidt v. Quinn*, 136 Mass. 575, the rule was again applied as against the judgment debtor in favor of the party holding under the execution. The court, in discussing the case, said: 'We see no reason why the rule of law should not be the same where the grant is involuntary, as by the levy of an execution, even although a right of way might have been expressly included in the levy, but was not.' It was applied to purchases made by tenants in common in *Smyles v. Hastings*, 22 N. Y. 217, and to mutual deeds arising on the settlement of an estate. *Palmer v. Palmer*, 150 N. Y. 139 (44 N. E. Rep. 966; 55 Am. St. Rep. 653). It was applied in favor of a mortgagor purchasing at foreclosure sale as against the mortgagee and over lands not described in the mortgage in the well-considered case of *Insurance Co. v. Patterson*, 103 Ind. 582 (2 N. E. Rep. 188; 53 Am. Rep. 550); and in *Ellis v. Bassett*, 128 Ind. 118 (27 N. E. Rep. 344; 25 Am. St. Rep. 421), the same rule was held to apply against the purchaser from the widow of Bassett of a five-acre tract of land which had been set apart to her in partition proceedings in the estate of her husband, and in favor of the purchaser at administrator's sale of the other part of the real estate. This court, in *Blum v. Weston*, 102 Cal. 362 (36 Pac. Rep. 778; 41 Am. St. Rep. 188), applied the same rule in partition proceedings as to parties holding under the decree of the court. The court approved the rule as announced in *Ellis v. Bassett*, 128 Ind. 118 (27 N. E. Rep. 344; 25 Am. St. Rep. 421), and held that the decree had the effect of vesting the title in the different parties, and that the rule would apply precisely as if they had conveyed to each other. Further authorities supporting the rule are: *Russell v. Jackson*, 2 Pick. 574; *Jones, Easem.* §§ 309-312; *Washb. Easem.* p. 261; *Godd. Easem.* p. 269."

**Sec. 196. Lateral support.** The law does not permit the owner of a lot in a populous city to make an excavation, even through an independent contractor, upon his lot in near proximity to his neighbor's house, and to a depth of some feet below the level of the foundations of that house, and be under no obligations either to see that the con-

said son became entitled to the lands. By the will of the son, certain trustees were appointed for the sale of the lands, and after his death the said trustees sold to the plaintiff in said case three parcels of land, to wit, the 'Allotment,' 'Draycott Field' and 'Carr Close,' and to defendant the 'Upper Meadow.' Soon after defendant's purchase, the owners of other portions of lands purchased at the trustees' sale closed up the way over their lands leading to defendant's lands, the 'Upper Meadow.' The case was argued at length in Trinity term as to whether or not the rule applied to a grant made by trustees. Lord Kenyon entertained great doubt upon the question, and ordered that the case might be argued again at the next term. Upon the calling of court, and before the case was reargued, the learned chief justice said: 'Upon further consideration I find it impossible to distinguish this from the general case where a man grants a close surrounded by his own land (in which case the grantee has a way to it of necessity over the land of the grantor) merely on the ground that the plaintiff conveyed to the defendant in the character of trustee, for it cannot be intended that he meant to make a void grant. There being no other way to the defendant's close but over the land of one of the persons who granted to him, he was entitled to such way of necessity upon the authority of all the cases, upon the principle that every deed must be taken most strongly against the grantor. \* \* \* There are, I think, great difficulties in the question; but, in the other mode of considering the case, those difficulties are gotten rid of altogether, and it falls within all the authorities, which are not controverted even by the plaintiff.' The rule thus laid down by Lord Kenyon has ever since been the rule in England and in this country. In *Collins v. Prentice*, 15 Conn. 38 (38 Am. Dec. 61), it was held to apply by one purchaser against another at probate sale made by executors under order of court, both purchases being made on the same day and as parts of the same estate. In *Pernam v. Wead*, 2 Mass. 202, it was held to apply in favor of a debtor as against a creditor who had taken part of the debtor's land under execution, leaving him no passage to the highway. In *Taylor v. Townsend*, 8 Mass. 410 (3 Am. Dec. 43), it was held to apply in favor of a creditor, as against a debtor, when the creditor had

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**Sec. 196. Lateral support.** The law does not permit the owner of a lot in a populous city to make an excavation, even through an independent contractor, upon his lot in near proximity to his neighbor's house, and to a depth of some feet below the level of the foundations of that house, and be under no obligations either to see that the con-

tractor in doing the work protects the neighbor's wall by the exercise of due care, or to give the neighbor timely notice of the nature and extent of the intended excavation, that he may take due precautions for the protection of his own wall. *Bonaparte v. Wiseman*, 89 Md. 12 (42 Atl. Rep. 918; 44 L. R. A. 482). Cal. Civ. Code, § 832 construed and applied—excavation by landowner—notice to adjoining owner. *Nippert v. Warneke*, 128 Cal. 501 (61 Pac. Rep. 96).

**Sec. 197. Rights of dominant and servient owners—Erection of gates, &c., over way—Repairs.** The servient owner has no right to close up a way over his land which another has a right to use in order to reach a public road, because the latter could reach the road by the use of another way. *Manbeck v. Jones*, 190 Pa. St. 171 (42 Atl. Rep. 536). A grantor conveying land for a new channel for a stream who reserves the right to cover it and when so covered to use and occupy it, may erect a building over the channel, where it does not interfere with the flow of the water. *St. Joseph Val. Ry. Co. v. Galligan*, 120 Mich. 468 (79 N. W. Rep. 685). A lot owner's easement in an alley created by grant is not extinguished by the owner of the servient estate erecting a gate at the end of the alley or placing structures beneath or over it, which do not interfere with the dominant owner's use of the alley as a passageway. *Boyd v. Hunt*, 102 Tenn. 495 (52 S. W. Rep. 131). After use for several years of a right of way granted by a railroad company across its right of way, such a company cannot obstruct the way by gates, bars or other fences, where it appears from the width of the way, restrictions as to its use in the grant, and the manner of its use that the way granted was a free right of passage. *Hamlin v. New York, N. H. & H. R. Co.*, 176 Mass. 514 (57 N. E. Rep. 1006). Where deeds between heirs dividing lands belonging to their ancestor stipulate that they grant to each other the free passage and use of all roads as they then existed in and through the land, one of their number cannot subsequently erect fences and gates across any of such roads where, at the time of the grants there were no fences or gates across such road. *Newsom v. Newsom*, Tenn. (56 S. W. Rep. 29). See opinion for review of au-

• authorities; also Ballard's Law of Real Prop., Vol. VII, § 184-186. Where the easement is of such a character that the want of repair injuriously affects the owner of the servient land, it becomes not only the right, but the duty of the owner of the easement to cause all necessary repairs to be made. *Thomas v. Blaisdell*, Nev. (58 Pac. Rep. 903).

**Sec. 198. Abandonment or extinguishment of easement.** Where one granting a right of way to a railroad which severs his land into two parcels, reserves a crossing over the right of way "to pass to the back land," the easement is extinguished when the unity of the ownership is destroyed. *Knowlton v. New York, N. H. & H. R. Co.*, 72 Conn. 188 (44 Atl. Rep. 8). One in whom an easement has been created by a grant does not lose his right thereto by his mere acquiescence in the occupancy and control of such land by others for a shorter time than the prescriptive period, where there are no other active evidences of an intention to abandon the same. *Johnson v. Stitt*, 21 R. I. 429 (44 Atl. Rep. 513). See opinion for discussion of this subject. Mere nonuser by the dominant owner of an easement created by grant, unaccompanied by any act of his clearly indicating his purpose of setting up no further claim to the easement, will not work an abandonment. *Boyd v. Hunt*, 102 Tenn. 495 (52 S. W. Rep. 131). In order for nonuser to effect an abandonment, there must be in connection with it some act on the part of the servient owner inconsistent with the existence of the easement. *Johnson v. Clark*, Ky. (57 S. W. Rep. 474).



# EJECTMENT

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## EPITOME OF CASES.

**Sec. 199. Nature of the action at common law.** In the case of *Brooke v. Gregg*, 89 Md. 234 (43 Atl. Rep. 38), the court of appeals of Maryland say: "At common law, the action of ejectment could only be used to recover the possession of real property. It was a very peculiar mode of proceeding. Both the plaintiff and defendant were fictitious persons. John Doe, the fictitious plaintiff, was supposed to have had devised to him a term of years by the claimant, who by reason thereof became the real plaintiff. A fictitious notice supposed to have been signed by Richard Roe, the imaginary defendant, was then served upon the party in possession, who was thereupon permitted to appear and defend, upon entering into the consent rule, by which he admitted the lease, entry, and ouster of the fictitious plaintiff. The judgment amounted to a 'recovery of the possession (not of the seizin or freehold), without prejudice to the right, as it might afterwards appear, even between the same parties.' *Taylor v. Horde*, 1 Burrows, 114; *Jackson v. Deiffendorf*, 3 Johns. 270. By the structure of such an action, and the pleadings therein, the title of the freehold was never directly put in issue, but only a trespass committed by John Doe on Richard Roe, in forcibly expelling him from a term of years. Nor could it be decisive between the real parties, because it was always in the power of the party failing, whether claimant or defendant, to bring a new action, by the employment of other fictitious parties. *Adams*, Ej. 351, marg.; *Miles v. Caldwell*, 2 Wall. 35; *Sturdy v. Jackaway*, 4 Wall. 174; *Walsh v. McIntire*, 68 Md. 420 (13 Atl. Rep. 348); *MacKenzie v. Renshaw*, 55 Md. 299."

**Sec. 200. As to when the action will lie and who may maintain it.** A landowner enjoying the possession of the

whole of the surface of his land cannot maintain ejectment against an intruding wall. *Rahn v. Milwaukee Elec. Ry. & Light Co.*, 103 Wis. 467 (79 N. W. Rep. 747). A railroad company entitled to the possession of land in which it has an easement for a right of way may maintain ejectment therefor. *Rutland R. Co. v. Chaffee*, 71 Vt. 84 (42 Atl. Rep. 984). Ejectment will not lie against a railroad company to recover possession of land which it rightfully has taken possession for its right of way under a contract with the owner thereof to convey it to the company upon completion of the road, although the company has not complied with the conditions of the contract. *Waggoner v. Wabash R. Co.*, 185 Ill. 154 (56 N. E. Rep. 1050). A vendee in possession and to whom the right of possession is given by his contract may maintain ejectment from one who has ousted him from the land. *Olin v. Henderson*, 120 Mich. 149 (79 N. W. Rep. 178). Where one in possession of land under a bond for title repudiates the contract, refuses to pay the balance due and claims to hold adversely, the vendor may maintain an action to recover possession, *Woodard v. Hennegan*, 128 Cal. 293 (60 Pac. Rep. 769); and the vendee cannot defend against the action in such a case on the ground that his vendor's title is not good, *Haile v. Smith*, 128 Cal. 415 (60 Pac. Rep. 1032). Grantees in possession of land under a deed void because made in the name of a firm of which they were members instead of to them, cannot be ejected by a subsequent grantee of the original owner, but they are entitled to retain possession until they can have the deed reformed to carry out the intention of the parties. *Cooper v. Newton*, Ark. (56 S. W. Rep. 867). Ejectment will not lie on behalf of the heirs of a testator against trustees in possession of real estate under his will, because some of the purposes of the trust are void within the rule against perpetuities, where there are independent active purposes of the trust in course of execution that clearly are not within that rule, and require that the trustees retain possession of the land in suit. *Simmons v. Hadley*, 63 N. J. L. 227 (43 Atl. Rep. 661). Ejectment may be maintained by the proper local municipal authority having control of a highway against a person unlawfully encroaching upon it, although the defendant has a right in the nature of an easement in the highway, and such an action may be

brought for so much only of the highway as is unlawfully in the occupancy of the defendant. *Ocean Grove Camp-Meeting Ass'n v. Berthall*, 63 N. J. L. 312 (43 Atl. Rep. 887). A residuary legatee of a grantor who has reserved the right to lease certain buildings on the granted premises for a specified time, may maintain the action against a tenant in default in the payment of rent. *Fiske v. Brayman*, 21 R. I. 195 (42 Atl. Rep. 878). Ind. Rev. Stat. 1894, § 1086 (Rev. Stat. 1901, § 1086), authorizing any person having a right to recover the possession of real estate, or to quiet title thereto, in the name of another person or persons, to prosecute the action in his own name, must be construed in connection with § 251, requiring every action to be prosecuted in the name of the real party in interest; and so construing these sections, it is held that one conveying premises occupied by his tenant cannot maintain a suit against the tenant to recover possession, notwithstanding he has agreed with his grantee that he will deliver possession to him and that until such possession is secured the tenant should be considered the grantor's tenant, but the grantee is the real party in interest. *Holliday v. Chism*, 25 Ind. App. 1 (57 N. E. Rep. 563).

**Sec. 201. Sufficiency of the complaint.** A tenant in common alleging ownership of the entire fee should be allowed to amend his complaint so as to allege ownership of an undivided estate. *Retan v. Sherwood*, 120 Mich. 496 (79 N. W. Rep. 692). A description of the property sought to be recovered which will enable the officer to identify it is sufficient. *Bay State Min. & Town-Site Co. v. Jackson*, Colo. (60 Pac. Rep. 573). How. Ann. Mich. Stat., §§ 7790, 7797 construed and applied—allegation of plaintiff's title required. *Olin v. Henderson*, 120 Mich. 149 (79 N. W. Rep. 178).

**Sec. 202. Title necessary to maintain the action.** Ejectment may be maintained upon proof of title by adverse possession, *Kepley v. Scully*, 185 Ill. 52 (57 N. E. Rep. 187); and a recovery may be had upon proof of title by possession under a complaint alleging title by inheritance from an ancestor, *Davis v. Leeper*, Ky. (56 S. W. Rep. 712). Ownership of a life estate is sufficient to main-

tain the action. *Towns v. Towns*, 121 Ala. 422 (25 So. Rep. 715). Executors who are directed by the will merely to sell the property have not sufficient title to maintain ejectment therefor. *Moore v. Bedford*, Tenn. (56 S. W. Rep. 1038).

**Sec. 203. Maintaining the action upon an equitable title.** In Alabama it is held that an equitable title will not support the statutory action for the recovery of land, *Sharpe v. Hyman*, 123 Ala. 105 (26 So. Rep. 289); and in Washington it is held that a holder of an equitable title not of record cannot maintain ejectment thereon against a purchaser of the legal title without notice of the equity, *Sengfelder v. Hill*, 21 Wash. 371 (58 Pac. Rep. 250). Under Kan. Gen. Stat. 1897, ch. 96, § 2, ejectment may be maintained upon an equitable as well as legal title, and, in the event of an allegation of legal title, proof of an equitable one would not be a variance, *Pope v. Nichols*, 61 Kan. 230 (59 Pac. 257); and applying the provisions of Colo. Code, § 59, permitting equitable defenses in "legal actions," it is held that the equitable owner of real property with the legal right to possession may maintain ejectment against one holding the legal title, *Lewis v. Hamilton*, 26 Colo. 263 (58 Pac. Rep. 196). The court say: "It seems absurd to say that a title with which a party may succeed as a defendant, and retain possession, cannot be used by him, as a plaintiff, out of, and seeking to obtain, possession. It ought to be that a title which may be successfully pleaded defensively should be attended with like results when pleaded affirmatively. \* \* \* In a jurisdiction which administers in the same action legal and equitable relief it seems idle to require her first to get a decree declaring the mortgagee's deed void before she could plead invalidity of the deed when set up against her as the defendant's sole right to possession. It may be that the greater number of authorities is against this position, but we think that the true spirit, as well as the letter, of our Code permits a plaintiff who has an equitable title, or is the equitable owner of real property with a legal right to possession, to maintain an action to recover its possession. In Kansas, under a provision of the Code, the holder of an equitable title may maintain the action. *Railway Co. v. McBratney*,

12 Kan. 9. In *Phillips v. Gorham*, 17 N. Y. 270, the court of appeals of New York, under code provisions like our own, recognized the principle which we hold governs this case. The opinion is an instructive one, and is in harmony with our views. See, also, to the same effect, *Murray v. Blackledge*, 71 N. C. 492; *Pom. Rem. & Rem. Rights*, §§ 98-103; 10 Am. & Eng. Enc. Law (2nd Ed.) 532 et seq., and cases cited; *Pom. Code Rem.* (3d Ed.) § 90 et seq.; *Pom. Code Rem.* (3d Ed.) §§ 98-103. In his work on *Code Pleading* (3d Ed. § 351), Judge Bliss does not wholly coincide with the conclusion of Mr. Pomeroy, yet says that the statutory action for the recovery of the possession of real property differs from the old ejectment, and that no man can be turned out who has a right to stay in, no matter who has the legal title. We conclude that under our Code, which permits of equitable defenses in actions for the recovery of the possession of real property, and therefore recognizes the right of an equitable owner to the possession, even though another has the legal title, the equitable owner, who, as such, has also the legal right to possession may, as a plaintiff, recover thereon from the defendant holding the legal title."

**Sec. 204. Proof of plaintiff's title—Burden of proof.**

Plaintiff must recover upon the strength of his own title, *Rowson v. Barbe*, 51 La. Ann. 347 (25 So. Rep. 139); *Willet v. Andrews*, 51 La. Ann. 486 (25 So. Rep. 391); *Creech v. Childers*, 156 Mo. 338 (56 S. W. Rep. 1106); and this rule applies even if the defendant has no title and is a trespasser, *Lowry v. Whitehead*, 103 Tenn. 396 (53 S. W. Rep. 731). But as against one who cannot show a better title, it is sufficient for the plaintiff to prove prior possession taken by him under a deed from one in possession under a claim of ownership in fee. *Harrell v. Enterprize Sav. Bank*, 183 Ill. 538 (56 N. E. Rep. 63); *Casey v. Kimmel*, 181 Ill. 154 (54 N. E. Rep. 905). Where the parties to an action claim title from a common source, it is not necessary to prove title beyond such source, *Bay State Min. & Town-Site Co. v. Jackson*, Colo. (60 Pac. Rep. 573); *Hyder v. Butler*, 103 Tenn. 289 (52 S. W. Rep. 876); but where defendant denies that he and the plaintiff claim title from a common source, it becomes incumbent upon the plaintiff

to show either a title from a paramount source, as from the government, or that he and the defendant do claim through a common source, and that his is the better title, *Village of North Chillicothe v. Burr*, 185 Ill. 322 (57 N. E. Rep. 32). The plaintiff must show that he has a legal title, and the right of possession in the land; but, when he has proven a title which is *prima facie* good, the burden is then cast on the defendant, and, if he undertakes to set up an outstanding title in a third person, he is required to establish the existence of it with clearness and precision, and generally such a one as would enable the stranger to recover in ejectment against either of the parties to the suit. *Richardson v. Baltimore & D. B. R. Co.*, 89 Md. 126 (42 Atl. Rep. 938). The rule that the burden of proof is upon the plaintiff applies where both parties claim title by adverse possession. *Beecher v. Ferris*, Mich. (82 N. W. Rep. 617). In an action to recover possession of real property, between a plaintiff who obtains his title directly from the grantee in a deed first of record, but executed subsequently to one from the same grantor to another grantee, and who can make *prima facie* title without recourse to the deed last mentioned, and a defendant who is a stranger to the title, and does not claim under the senior grantee, it is not incumbent upon the plaintiff to show that the junior grantee was a purchaser in good faith and for a valuable consideration, or to show himself to be such a purchaser. *Barber v. Robinson*, 78 Minn. 193 (80 N. W. Rep. 968).

**Sec. 205. Defenses admissible under the general issue**

**—Outstanding title as a defense.** A defendant may show under a general denial that he is rightfully in possession as tenant, where it appears that the plaintiff has no cause of action. *Cunningham v. Roush*, 157 Mo. 336 (57 S. W. Rep. 769). The defense of title by adverse possession is available under the general denial. *Murray v. Romine*, 69 Neb. 94 (82 N. W. Rep. 318); *Hedges v. Pollard*, 149 Mo. 216 (50 S. W. Rep. 889). This rule is statutory in Kentucky. *Shaw v. Revel*, Ky. (51 S. W. Rep. 566; 21 Ky. Law Rep. 348). A former judgment in an action of ejectment between the same parties is admissible under the general issue. *Brooke v. Gregg*, 89 Md. 234 (43 Atl. Rep. 38). Where the complaint in an action of ejectment alleges

the plaintiff's title generally, without disclosing the source of it or his right of possession, if the defendant has an equity which, as it exists, and without any affirmative relief, defeats the plaintiff's right of possession, it may be proved under a general denial, being strictly defensive; but if the equity is such that it does not give the defendant the right of possession, as against the legal title, without affirmative relief enforcing it, then he must plead the facts entitling him to such relief. *Travelers' Ins. Co. v. Walker*, 77 Minn. 438 (80 N. W. Rep. 618).

The action may be defeated by showing a paramount outstanding title in a third person. *Rowson v. Barbe*, 51 La. Ann. 347 (25 So. Rep. 139). The same rule prevails in Alabama in favor of a defendant in possession under color of title, *Price v. Cooper*, 123 Ala. 392 (26 So. Rep. 238); and in Georgia it is held that a defendant may defeat the action by showing a paramount outstanding title to the premises in a third person without connecting his possession with that title, *Jenkins v. Southern Ry. Co.*, 109 Ga. 35 (34 S. E. Rep. 355). A defendant who is a mere trespasser cannot defeat the action by setting up an outstanding title in another. *Casey v. Kimmel*, 181 Ill. 154 (54 N. E. Rep. 905).

**Sec. 206. Defenses in ejectment—Miscellaneous notes.**

In Colorado it is held that a defendant may set up a title acquired after the action was begun. *Duggan v. McCullough*, Colo. (59 Pac. Rep. 743). A former judgment between the same parties in trespass *quare clausum* is not admissible as a defense, where no question of title was determined in the prior action. *Central Baptist Church v. Manchester*, 21 R. I. 357 (43 Atl. Rep. 845). A defendant who shows no title or right to the possession cannot invoke the doctrine of estoppel or laches against the plaintiff holding under a valid record title. *Cooper v. Newton*, Ark. (56 S. W. Rep. 867). In Arkansas it is held that laches cannot be pleaded as a defense to an action in a court of law to recover possession of land. *Rowland v. McGuire*, 67 Ark. 320 (55 S. W. Rep. 16). An action of ejectment by a purchaser at execution sale under a judgment rendered in attachment proceedings cannot be defeated by proof of the death of the attachment defendant

before rendition of the judgment, where the record in the attachment proceedings shows that the action was brought and the writ levied prior to the defendant's death. *Shea v. Shea*, 154 Mo. 599 (55 S. W. Rep. 869; 77 Am. St. Rep. 779). Where, pending an action for the recovery of real estate, the title to the land and the right of possession become vested in the defendant by operation of law, without the concurrence of the plaintiff, this fact may be pleaded in bar to further prosecution of the suit. *Hilliker v. Simpson*, 92 Me. 590 (43 Atl. Rep. 495). Construing and applying Wis. Rev. Stat., § 3074, it is held that a defendant claiming title under a tax deed who acquires other tax deeds during the pendency of the action, by proper pleadings must assert the title he claims under them, and if he fail to do so he is estopped from afterward claiming title under such deeds. *Bell v. Peterson*, 105 Wis. 607 (81 N. W. Rep. 279). Where, in the absence of a provision to the contrary, a mortgagee is entitled to possession, proof of the existence of a mortgage is a defense to an action of ejectment by the mortgagor; but such a defense is not sustained by proof of the existence of a mortgage expressly giving the mortgagor the right of possession until maturity of the debt, and providing for re-entry by the mortgagee upon the continuance of default for so many days after written demand, no re-entry by the mortgagee having been shown. *Richardson v. Baltimore & D. B. R. Co.*, 89 Md. 126 (42 Atl. Rep. 938). Ala. Code, § 1533, construed and applied—disclaimer by defendant. *Bailey v. Selden*, 124 Ala. 403 (26 So. Rep. 909). For a discussion of the practice in Oregon where a cross complaint is filed by a defendant asserting title and seeking equitable relief, see *South Portland Land Co. v. Munger*, 36 Or. 457 (60 Pac. Rep. 5).

**Sec. 207. Verdict and judgment in ejectment—Sufficiency and effect of.** A verdict in ejectment should describe the land intended to be recovered so that the description copied into the writ of itself will show the sheriff the land he is to take. *Benne v. Miller*, 149 Mo. 228 (50 S. W. Rep. 824). Where the complaint clearly presents an issue as to the location of a boundary line, a verdict which merely finds for the plaintiff the land as described in the declaration, without finding the true location of such line,



is insufficient. *Miller v. Holt*, 47 W. Va. 7 (34 S. E. Rep. 956). A verdict in an ejectment case, whereby the jury undertake to find for the plaintiff a portion only of the premises sued for, and the terms of which are so vague and indefinite that the land therein referred to cannot be located and identified by construing the verdict in the light of the pleadings, and the metes and bounds of which could be arrived at only by resorting to extrinsic evidence, is too uncertain to support a judgment. *McCullough v. East Tennessee, V. & G. Ry. Co.*, 106 Ga. 275 (32 S. E. Rep. 97). A judgment that the plaintiffs recover possession of the premises from the defendant impliedly adjudges that they were the owners in fee. *Bell v. Peterson*, 105 Wis. 607 (81 N. W. Rep. 279). Applying Wis. Rev. Stat., § 3077, which requires that the plaintiff shall define in his complaint the character of his title, and § 3086, providing that on default in ejectment the judgment shall be for the plaintiff according to the estate alleged in his complaint, it is held that a judgment in pursuance of a defendant's offer to allow the plaintiff to take judgment according to the demand of the complaint, in which it is adjudged that he is the owner in fee simple and entitled to the possession of the real estate is not erroneous where he alleged such ownership and right in his complaint. *Emerson v. Pier*, 105 Wis. 161 (80 N. W. Rep. 1100). Persons unlawfully entering upon the land, pending ejectment, are bound by the judgment subsequently rendered. *Walker v. Arnold*, 71 Vt. 263 (44 Atl. Rep. 351). In an action by third persons in possession of real estate not parties to an action in ejectment to enjoin the enforcement of a judgment therein in favor of the plaintiff, in the absence of any showing to the contrary, it will be presumed that all persons coming into possession of the premises subsequent to the commencement of that action came in under the defendants therein. This presumption is not overthrown by showing that they came in under a stranger to the action, unless they also show that such stranger was in possession at or prior to the commencement of the action, or was entitled to the possession by virtue of a title adverse to that of the plaintiff in the action, which the court would be authorized to protect against the enforcement of the judgment. Upon the issue of their right to remain in possession, the burden is upon

them to show affirmatively that their possession is right-ful, and under a title that has not been determined in the action, and that such possession was not taken by collusion with the defendants in the judgment. *Scheerer v. Goodwin*, 125 Cal. 154 (57 Pac. Rep. 789). A writ of possession issued against a husband alone in pursuance of suits to which the wife was not a party cannot be enforced against her to deprive her of rights acquired prior to its issuance and service. *Boykin v. Jones*, 67 Ark. 571 (57 S. W. Rep. 17). Mont. Code Civ. Proc., § 1732, providing for a stay of execution in ejectment, applies in case of an appeal by a defendant in ejectment involving an unpatented mining claim. *State v. Second Judicial Dist. Court*, 24 Mont. 330 (61 Pac. Rep. 882).

**Sec. 208. Trial by court or jury—Evidence and instructions.** In an action of ejectment to enforce a resulting trust, the trial judge acts as a chancellor, as to the question of the existence of the alleged resulting trust; and if, in his judgment, the evidence is insufficient to sustain a verdict, he may withdraw the case from the jury. *Bowen v. Haupt*, 192 Pa. St. 406 (43 Atl. Rep. 963). In Missouri an answer admitting the facts constituting the plaintiff's cause of action and setting up other facts of an equitable character in avoidance, converts the whole case into a suit in equity triable by the court. *Lewis v. Rhodes*, 150 Mo. 498 (52 S. W. Rep. 11); *Dunn v. McCoy*, 150 Mo. 548 (52 S. W. Rep. 21). A constitutional provision (R. I. Const., art. 1, § 15) that "the right of trial by jury shall remain inviolate," is not violated by a statute (Gen. Laws, ch. 237, § 9) requiring a defendant in an action for possession of leased premises to give bond to pay all rent, damages and costs as a prerequisite to awarding him a jury trial. *Mathewson v. Ham*, 21 R. I. 311 (43 Atl. Rep. 848).

Particular evidence held to authorize submission to the jury of the question whether the defendant was in possession. *Cowles v. McNeill*, 125 N. C. 385 (34 S. E. Rep. 499). For particular fact cases determining the sufficiency of the evidence in reference to the direction of a verdict, see *Douglas v. Muse*, 62 Kan. 865 (61 Pac. Rep. 413); *Brundage v. Bivens*, 105 Ga. 805 (32 S. E. Rep. 133); *Granby Mining & Smelting Co. v. Davis*, 156 Mo. 422 (57 S. W. Rep. 126).

Where there is evidence to support the plaintiff's claim of title by adverse possession, evidence of its general recognition in the neighborhood is admissible. *Tennessee Coal, Iron & R. Co. v. Linn*, 123 Ala. 112 (26 So. Rep. 245). For cases determining particular questions as to the admissibility of evidence, see *Beattie v. Crewdson*, 124 Cal. 577 (57 Pac. Rep. 463); *Brigham City v. Crawford*, 20 Utah, 130 (57 Pac. Rep. 842); *Graves v. Hebbbron*, 125 Cal. 400 (58 Pac. Rep. 12); *Barron v. Barron*, 122 Ala. 194 (25 So. Rep. 55); *Jackson v. Singleton*, 122 Ala. 323 (25 So. Rep. 204). For cases determining the applicability of particular instructions, see *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70 (56 N. E. Rep. 1088); *Henry v. Henry*, 122 Mich. 6 (80 N. W. Rep. 800); *Holmes v. Deppert*, 122 Mich. 275 (80 N. W. Rep. 1094); *Crossen v. Oliver*, 37 Or. 514 (61 Pac. Rep. 885); *Benne v. Miller*, 159 Mo. 228 (50 S. W. Rep. 824); *West Missouri Land Co. v. Thompson*, 157 Mo. 647 (57 S. W. Rep. 1042).

**Sec. 209. Practice in ejectment—Miscellaneous notes.**

On the general issue in an action of ejectment the plaintiff has a right to rely upon any title the evidence may disclose. *Porter v. Gaines*, 151 Mo. 560 (52 S. W. Rep. 376). A landlord seeking to maintain ejectment against a tenant at will must prove a prior demand for possession. *Zilch v. Young*, 184 Ill. 333 (56 N. E. Rep. 318). Equities existing in favor of a tenant in common on account of his taking an assignment of a mortgage and purchasing the land before foreclosure sale thereof, cannot be adjusted in an ejectment suit brought by him against his cotenant. *Retan v. Sherwood*, 120 Mich. 496 (79 N. W. Rep. 692). In an action of ejectment brought by one against a party in possession of a mine under a contract of sale from the plaintiff, on which default had been made in payment, the plaintiff may have a temporary injunction, pending the action against the defendant committing waste, but such injunction will not be extended to acts which do not constitute waste. *Williams v. Long*, 129 Cal. 229 (61 Pac. Rep. 1087). Particular delay in the prosecution of an action held to authorize a nonsuit. *Hillsdale Coal & Iron Co. v. Heermans*, 191 Pa. St. 116 (43 Atl. Rep. 76). Applying the rule that in ejectment the plaintiff must recover upon the strength of his own title, it is held to be error for a court to charge in an action brought to set aside a verdict

in ejectment, that it was necessary for the defendants to show that they had a good and valid defense to the original action. *Dodge v. Williams*, 107 Ga. 410 (33 S. E. Rep. 468). Ala. Code 1896, §§ 1534, 1535, construed and applied—action against tenant—making landlord a party. *McClendon v. Doe*, 122 Ala. 384 (25 So. Rep. 30). Ala. Code, § 1554, construed and applied—effect of two judgments in favor of defendant. *Smart v. Kennedy*, 123 Ala. 627 (26 So. Rep. 198). S. C. Rev. Stat. 1893, §§ 1937, 1939, construed and applied—ejectment against tenant holding over—entry and demand of possession by landlord—jurisdiction of magistrates. *Kellar v. Pagan*, 54 S. C. 255 (32 S. E. Rep. 353).

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## EMINENT DOMAIN

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### FRAZER v. CITY OF CHICAGO.

(186 Ill. 480.)

What constitutes a taking of property—Injury to property by city exercising its police power—Erection of smallpox hospital. The erection and maintenance of a smallpox hospital by a city having special statutory authority so to do, does not constitute a taking of property in the vicinity of the hospital, to the extent the value of such property is thereby impaired, within the meaning of Ill. Const. art 2, § 13, providing that private property shall not be taken or damaged for public use without just compensation, where the hospital property is rightfully located and well conducted.

PHILLIPS, J.

**Sec. 210. Statement of the case.** Appellants brought suit against the city of Chicago, seeking to recover for damages to their property by reason of the erection, maintenance, and intended maintenance by it of a smallpox hospital on property belonging to the city, situated on the east side of Lawndale avenue, within the city. The property of plaintiff's is unimproved, and is situated on the west side of Lawndale avenue, between West Thirty-third and West Thirty-fifth streets,

and is directly opposite blocks 7 and 8 in Cass' subdivision,—property owned by the city, on which it built its hospital, which was opened for use December 10, 1896; said property being acquired by the city, and said smallpox hospital being erected, after plaintiffs acquired title to their lands on the west side of Lawndale avenue. Plaintiffs' declaration consisted of five counts; and, without giving the substance of each count in detail, charges that the hospital was erected within 50 feet of, and facing Lawndale avenue; that the hospital has received, in the two years since it has been opened, 100 smallpox patients; that Chicago has a population of 2,000,000; that there are annually a large number of people afflicted with the disease known as "smallpox;" that the maintenance of this hospital for the purpose of isolating those so afflicted has damaged, and will greatly damage, plaintiffs' lands, in a way not common to the general public; that smallpox is a highly contagious disease, and nearness of the hospital frightens persons, and renders plaintiffs' property much less adapted for investment purposes, and limits the use which plaintiffs might otherwise make of their lands; that such acts of the defendant constitute a permanent injury for the benefit of the public, within the meaning of the section of the constitution prohibiting the damaging of private property for public use without compensation, and unreasonably limit the use to which plaintiffs' lands might be put, whereby plaintiffs have sustained special damage not common to the general public; that it becomes necessary to collect all persons afflicted with smallpox into one place, to guard against the spread of the disease; and to facilitate treatment, and the collection of such patients at the place described renders ingress and egress to and from plaintiffs' property upon and over Lawndale avenue (by which public highway alone egress and ingress was then and is now possible) unsafe and dangerous to travel upon foot or in carriages or other vehicles, and greatly interferes with the private property rights which plaintiffs, as owners of land adjoining said highway, have as appurtenant to their premises, rendering said land much less adapted for investment purposes, for leasing, and for subdivision into city lots, for building sites, for the erection of dwellings for rent, and much less suitable for manufacturing sites and for residence, and that thereby the market value of plaintiffs' lands has been and is greatly decreased, to-wit, \$15,000. A general

demurrer to the declaration was sustained, and, plaintiffs electing to stand by their declaration, judgment was entered dismissing the suit, and against plaintiffs for costs, to reverse which this appeal is prosecuted.

**Sec. 211. What constitutes a taking of property—Injury to property by city exercising its police power—Erection of smallpox hospital.** Appellants contend that the acts set forth in their declaration constitute a taking or damaging of private property for a public use, within the intent and meaning of section 13 of article 2 of the constitution, providing that private property shall not be taken or damaged for public use without just compensation. The position of the appellee is, that, a necessity existing for the establishment of a smallpox hospital, it was within the police power of the city to locate the same on its own property, and that any loss suffered by the plaintiffs is *damnum absque injuria*, or that, in contemplation of law, the loss sustained by the plaintiffs is compensated for in the benefits received thereunder, and that no compensation can be had for the injuries sustained. The case at bar presents no taking of private property. Neither is there a physical injury. Nor does it fall within that class of cases where, notwithstanding there has been no taking or physical injury, together with resulting damages, yet the intrinsic value of the property is lessened by reason of access being interfered with or its accessibility is prevented or impaired. The real injury alleged, and for which plaintiffs seek a recovery, is the menace to the health of the inhabitants in the vicinity of the hospital, or, rather, to those inhabitants who in the intended future use of plaintiffs' property might become residents in the vicinity thereof, and who, by reason of its location, would be deterred from purchasing plaintiffs' property, and the consequent loss in the speculative value thereof. Neither does it appear from the declaration that the city has been careless or negligent in the maintenance of the hospital, or that by reason of any act of omission or of commission on the part of the city it has become a nuisance to any greater extent than is inherent to the location and use of such an institution. Counsel for appellants, in their brief, state: "We are not here complaining of any negligence of the city. We assume that the pest house is rightfully located and well conducted." The demurrer admits the facts well pleaded

in the declaration. Does the declaration set forth a cause of action? The seventy-seventh clause of section 1 of article 5 of the city and village act expressly gives power to the city "to erect and establish hospitals and medical dispensaries, and control and regulate the same." The establishing of this smallpox hospital was therefore clearly within the police power of the city, and it is clear, therefore, that in the absence of carelessness or negligence, or of an abuse of that power in any way, the hospital could not be a public nuisance. Nor could it be a private nuisance unless it should become such in its subsequent use or unwarranted operation, having in view the peculiar conditions under which it was established and maintained. In *Rigney v. City of Chicago*, 102 Ill. 64, this court said (page 80): "There are certain injuries which are necessarily incident to the ownership of property in towns or cities, which directly impair the value of private property, for which the law does not and never has afforded relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property; yet that is clearly a case of *damnum absque injuria*." In *Oliver v. City of Worcester*, 102 Mass. 489 (3 Am. Rep. 489), the court said: "The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, as the management of property and rights held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public. In the one case no private action lies unless it be expressly given; in the other there is an implied or common-law liability for the negligence of the officers in the discharge of such duties." In *Village of Carthage v. Frederick*, 122 N. Y. 263 (25 N. E. Rep. 480; 10 L. R. A. 178; 19 Am. St. Rep. 490), the court, in speaking with reference to the police power, said: "Municipal corporations have exercised this power for time out of mind, by making regulations to preserve order, to promote freedom of communication, and to facilitate the transactions of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or peculiar loss, as each member of a community is presumed to be benefited by

that which promotes the general welfare. All authorities agree that the constitution presupposes the existence of the police power, and it is to be construed with reference to that fact." In Sedgwick on Constitutional Law (page 435) it is said: "The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given."

Appellants concede the well-settled rule that private property, itself a nuisance and obnoxious to the health or safety of a community, may be abated by a municipality, under its police power, without being liable for resulting damage to the owner thereof, but insist that this case presents a condition where private property, itself unoffending, and owned and acquired without any infringement of the property or personal rights of others, has been injured to a degree greater than the property of others so held and owned by them, and that the guaranty of the constitution that private property shall not be damaged for public use without just compensation therefor applies. Conceding that the declaration shows special injury to the appellants in excess of that shared by them with the general public, it could only be under this constitutional provision that a recovery could be here maintained. The law is well settled that where a thing not *malum in se* is authorized to be done by a valid act of the legislature, and it is performed with due care and skill, in strict conformity with the provisions of the act, its performance cannot, by the common law, be made the ground of an action, however much one may be injured by it. *Rigney v. City of Chicago*, 102 Ill. 64. In support of appellants' contention that the acts complained of here are actionable under our constitution, reliance is placed, among other cases, on the *Rigney Case* *supra*; *Railway Co. v. Darke*, 148 Ill. 226 (35 N. E. Rep. 750); and *Insurance Co. v. Heiss*, 141 Ill. 35 (31 N. E. Rep. 138; 33 Am. St. Rep. 273). There is a marked difference in the use by a city of its property carefully, prudently, and without negligence, in the reasonable exercise of its police power, and that of the change of grade



of streets, the building of a viaduct, the closing of a street or alley, or the inconvenience caused by the use and operation by a railroad company of its property. In the case of the change of grade the measure of damages allowable is the difference in the value of the property before and after the making of the improvement, taking into consideration the increased value of the improvement to the property itself. Nor, as above indicated, can there be any recovery for damages sustained, shared by the public in common. Supposed damages growing out of the proper exercise of the police power must be considered *damnum absque injuria*, in the theory of the law that the plaintiff is compensated for the injury sustained by sharing in the general benefits which are secured to all by reason thereof. As stated by Dillon, in his work on *Municipal Corporations* (Vol. I, § 212): "Every citizen holds his property subject to the proper exercise of the police power, either by the state legislature directly, or by public or municipal corporations, to which the legislature may delegate it. \* \* \* It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. \* \* \* If one suffers injury it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

**Sec. 212. Use of property for hospital not an unreasonable, unusual or extraordinary use.** But finally appellants contend that it is an unreasonable, unusual, and extraordinary use of property to utilize it for segregation of contagious diseases, and cite in support thereof *Kobbe v. Village of New Brighton* (Sup.), 45 N. Y. Supp. 777; *City of Baltimore v. Fairfield Imp. Co.*, 87 Md. 352 (39 Atl. Rep. 1081; 40 L. R. A. 494; 67 Am. St. Rep. 344); and *Com. v. Alger*, 7 Cush. 86. Under the express delegation of power by the legislature, we cannot hold that the application of property for the use of a smallpox or other hospital is such an unusual or unreasonable use of property as would take it out of the police power of the city, so as to render it liable for such application, when, as here, it is conceded that the pest house is rightfully located and well conducted. In the case of *City*

of *Baltimore v. Fairfield Imp. Co.*, 87 Md. 352 (39 Atl. Rep. 1081; 40 L. R. A. 494; 67 Am. St. Rep. 344), the complainants sought by injunction to restrain the city of Baltimore from placing and keeping on a 20-acre tract of land owned by the city a woman afflicted with leprosy, which land of the city adjoined lands of the complainants. There is a wide difference between the establishing and maintaining of a hospital for the treatment of disease, and in appropriating a piece of property for the keeping of a single patient by an unskilled laborer and his family, having no knowledge of the disease of leprosy, with which the patient was afflicted. The facts appearing in that case might well have justified the interference by the court, by injunction to restrain the use, having reference to all the surrounding conditions, and yet not militate against the view we have taken, that annoyance or damage resulting from the rightful location and proper conducting of the hospital in question offers no basis for relief in damages. As was said in that case: "The evidence shows that the health authorities propose to place this woman in the charge of a laborer and his wife. They are unskilled people. They possess no authority to restrain the woman from wandering away, and they have no legal right to detain her against her will. They are not officers of the city, nor clothed with any of the powers of the board of health. They are simply employed by the city to care for this woman on the city's property, where no health officer or city official is stationed." In commenting on the right to the exercise of the police power, the court, with reference to an unreasonable exercise thereof, say: "Whatever immunity a municipality may have in exercising a public as contradistinguished from a strictly corporate power, it does not result from some collateral act, or from the negligent doing of a permissible act. The infliction of an injury upon another is neither the natural nor necessary result of an exercise of the power to build a hospital, but, if injury does ensue, it would result from the collateral circumstance that the place selected was not the appropriate site, or from the negligent method of doing what would otherwise be a lawful act." And this case recognized the doctrine that for the doing of an act clearly within the power of the city under its police power, where injury is the necessary result to the doing thereof, no redress can be had. The court say: "The statute law of this state confers upon the mayor and city

council plenary power to establish, both within and beyond the city's limits, hospitals and pest houses for the isolation and treatment of contagious and infectious diseases. The preservation of the public health renders such legislation highly essential, and the authority of the general assembly to enact it in the exercise of the police power of the state is beyond question or controversy. Within the scope of the power thus granted, the whole authority of the state is included and delegated. *Harrison v. Mayor, etc.*, 1 Gill, 264. And, therefore, whatever the state may directly do in furtherance of these objects the municipality clothed with the delegated power from the state may also lawfully perform, though there may be a difference as to the legal consequences resulting from an exercise of the power by the state directly, and those flowing from an exertion of the same power by the municipality. If it be conceded that the state may, in exercising a public power, create a private nuisance with immunity the immunity grows out of the public necessity, and rests upon the state's sovereignty; but it cannot, or, at all events, will not, in the absence of an explicit legislative delegation, be assumed that the state would, if directly exercising the same power, so exercise it as to produce or cause an injury to the rights of property to an individual, unless, perhaps, the very doing of the act directed to be done will necessarily and unavoidably, under any condition, result in the creation of what would be, but for the authorization, a private nuisance." We can see no difference, in principle, between the right of a city to establish and maintain a smallpox hospital, and to erect and use jails, fire-engine houses, calaboooses and the like. Greater care might be required in the maintenance of one than the other, and different considerations would undoubtedly enter into the selection of a site of a pest house than of a fire-engine house or jail; but the city would be liable only for an abuse of authority or an unwarranted exercise of discretion in locating or maintaining the same, having reference to the present necessities, the crowded condition of the locality in which they are placed or maintained, and other pertinent facts and circumstances. The declaration does not seek to charge any act of omission in this regard. The demurrer was properly sustained, and the judgment of the circuit court of Cook county is affirmed. Judgment affirmed.

**Sec. 213. "Damaging" property as a taking.**

In construing the constitutional provision of Georgia that "private property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid" (Civ. Code, § 5729), it is held that the word "damaged" is used in its usual sense as a law term, and does not change the substantive law of damages, or create a cause of action where none previously existed; nor does it abrogate the principle expressed in the phrase "damnum absque injuria," but it does preserve all existing causes of action for damages to private property, and prohibit exemptions of liability for such damages, even if occasioned by public uses; the word "damaged" in this clause refers to "actionable wrongs," and does not require compensation for depreciation in the value of private property caused by the lawful operation of a public work owned by a corporation vested with the power of eminent domain, unless a private corporation or private individual would be liable for similar acts under like circumstances; nor is a quasi public corporation liable where private property is depreciated in value as a result of the lawful use and enjoyment of the company's private property; to "damage" property, within the meaning of the constitution, there must be some physical interference with property, or physical interference with a right or use appurtenant to property; and therefore a railway company is not liable to the owner of real property for a diminution in the market value thereof, resulting from the making of noise, or from the sending forth of smoke and cinders, in the prosecution of the company's lawful business, which does not physically affect or injure the property itself, but merely causes personal inconvenience or discomfort to the occupants of the same. *Lumpkin, P. J., and Lewis, J., dissenting. Austin v. Augusta T. Ry. Co., 108 Ga. 671 (34 S. E. Rep. 852; 47 L. R. A. 755).* See conflicting opinions for exhaustive review of authorities on this subject.

**Sec. 214. Damage to property by the erection of a hospital, prison or jail.**

In *Attorney General v. Manchester* [1893], 2 Ch. 87, an injunction was sought by the attorney general at the relation of a district local board, restraining defendant from establishing hospitals, for the reception of persons suffering from smallpox or other infectious diseases, so as to cause a nuisance to the inhabitants of the neighborhood. The court, however, refused the relief sought, as the plaintiff failed to show that there was a probability that the apprehended danger would in fact ensue, and stated that if, in such a case, the evidence showed that the maintenance of a smallpox hospital was on the whole more beneficial to the health of the public at large than the leaving of the persons suffering from the disease, scattered in their own homes, it was a question whether some weight might not properly be allowed to such circumstances. An injunction will not lie at the suit of an adjoining owner

to restrain the erection of buildings for a legal and proper object, such as a hospital for the insane, where the only injury to or depreciation in the value of the adjoining property is that due to the mere nature of the purpose for which such buildings are to be used, and not to any actual inconvenience caused thereby, or the manner in which the hospital will be conducted. *Crawford v. Protestant Insane Hosp.*, M. L. R. 7 Q. B. 57. The erection of a prison or jail by the municipal authorities of a city, within the limits thereof, is not an invasion of the property rights of the owner of adjacent lands, so as to give him the right to an injunction or afford him the foundation of an action for damages against the city. *Burwell v. Commissioners of Vance County*, 93 N. C. 73 (53 Am. Rep. 454); *Long v. City of Elberton*, 109 Ga. 28 (34 S. E. Rep. 333; 46 L. R. A. 428; 77 Am. St. Rep. 363). In the last case the court say: "The simple erection of a necessary prison building cannot, without more, so injure adjacent property as to entitle the owner to have damages for such erection. No one is so hindered in the use of his property, and so restricted as to the character of buildings he shall put upon it, as to make it necessary to consult adjacent lot owners in reference to the improvements to be made. The lot being his own property, the owner may put it to such use as he sees proper, provided the buildings and improvements made by him do not infringe the legal right of his neighbor to the similar enjoyment of his own property. A log house on a fashionable street may be built alongside of a palace, and by its erection the value of the latter may be depreciated, but that depreciation is *damnum absque injuria*. The owner of the lot has as much right to erect the hut as the other has to build his palace—no more, no less; but, if the hut or the palace be so used as to interfere in the lawful enjoyment of his property by the other, there the damage, with a right to compensation, exists. If noxious gases from a business carried on in either befouls the air which the other is entitled to have without it; if the flow of poisonous fluids from a manufactory carried on either sterilizes the land of the other; if offensive smells emanate from the one, and affect the health of those dwelling in the other,—then there is a cause of injury which the law will redress, because the use which brings about any of these things is an infringement on the rights of the other; but none can be allowed for the character of the building. The municipal authorities of the city of Elberton, being vested with certain powers of government, had a legal right (being necessary to the exercise of those powers) to erect a building for the purpose of furnishing public offices and maintaining a prison in which might be securely kept violators of the law; and the rule is clearly established that a corporation authorized by the law to do a particular thing, so long as it keeps within the scope of the power granted, is completely protected from proceedings, either at law or in equity, in behalf of the public therefor (2 Wood, Nuis. § 753); and that if, in the discharge of a duty imposed by law, it proceeds in a careful and

prudent manner, the damages resulting therefrom to individuals are *damnum absque injuria*—*Northern Transportation Co. v. City of Chicago*, 99 U. S. 635; *Fair v. City of Philadelphia*, 88 Pa. St. 309 (32 Am. Rep. 455); *Flori v. City of St. Louis*, 69 Mo. 341 (33 Am. Rep. 504); *Toolan v. City of Lansing*, 38 Mich. 315. In the case of *Bacon v. Walker*, 77 Ga. 338, this court, Chief Justice Jackson delivering the opinion, said: 'It is true that nobody would be pleased at the erection of a jail in the vicinity of his residence, but it must be built somewhere. It is a public necessity. It is authorized by law. In no sense, or rather in no legal sense, is it a nuisance. Nothing that is legal in its erection can be a nuisance per se. Much less can that which public necessity demands be one. \* \* \* It must be built in some part of the city, and near to somebody's house, \* \* \* and equity will not stop the public works because of such damage.' And in the case of *Pause v. City of Atlanta*, 98 Ga. 103 (26 S. E. Rep. 492), this court, through Atkinson, J., said: 'A distinction should be borne in mind between those cases where one seeks to recover because of the appropriation by the public to the public use of private property, and damages to one's property sustained in consequence of the construction of such public improvement, and that other class of cases, in which, though one's property be neither appropriated nor damaged, yet, in consequence of the construction of such improvement, one suffers damage resulting from personal inconvenience, and consequent damage in the conduct of one's business. In the former cases the right of compensation is a matter of principle; the amount of damage, a mere matter of degree. However slight or however great one's damage may be, he is nevertheless entitled to compensation. In the latter class of cases something more must appear than mere damage or inconvenience. It must be made to appear that, in the construction of such an improvement, the municipal authorities have been guilty of negligence, omission of duty, or negligent commission of an act authorized by law, in order to authorize recovery.'"

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## EPITOME OF CASES.

### Sec. 215. Constitutional right of eminent domain.

Where there is no constitutional provision to the contrary, the legislature of a state may authorize a foreign corporation to exercise the power of eminent domain for public uses in the state, although the exercise of such power incidentally will promote public uses in another state. *Columbus Waterworks Co. v. Long*, 121 Ala. 245 (25 So. Rep. 702). A statute (Mich. Comp. Laws, 1897, § 4334) providing for an acquisi-

tion of the right to construct a drain across a railroad right of way which requires the railroad company to make and maintain at its own expense the necessary opening through its roadbed and to build and maintain a suitable culvert, is unconstitutional, as to such requirements of the company. *Chicago & G. T. Ry. Co. v. Chappel*, 124 Mich. 72 (82 N. W. Rep. 800). For a discussion of the power of the Board of Levee Commissioners of Orleans to take property under the exercise of its police powers, see *Koerber v. Orleans Levee Board*, 51 La. Ann. 523 (25 So. Rep. 415).

**Sec. 216. As to what constitutes a public use.** As to whether a use is a public use is a judicial question. *Fanning v. Gilliland*, 37 Or. 369 (61 Pac. Rep. 636); *Stratford v. City of Greensboro*, 124 N. C. 127 (32 S. E. Rep. 394). Lands may be taken by the state for a public use. *People v. Adirondack Ry. Co.*, 160 N. Y. 225 (54 N. E. Rep. 689). The taking of lands for a public street does not constitute a taking for a private use merely because individuals contribute to the cost of laying out and improving the street. *Stratford v. City of Greensboro*, 124 N. C. 127 (32 S. E. Rep. 394). Under Minn. Gen. Stat. 1894, §§ 2645, 2646, a railway company is authorized to acquire land by condemnation for a right of way for a spur track from its main line to its gravel pit, for the purpose of obtaining the necessary gravel to enable it safely to maintain and operate its road; and such a taking of land is for a public purpose or use. *In re Minneapolis & St. L. R. Co.*, 76 Minn. 302 (79 N. W. Rep. 304). An objection to an appropriation of land by a municipality for an alleged public use, on the ground that such use is not a public use, may be made by any tax payer subject to taxation to pay the cost of such taking. *Stratford v. City of Greensboro*, 124 N. C. 127 (32 S. E. Rep. 394).

**Sec. 217. Appropriation of land for telegraph or telephone lines.** Prior to Act Mar. 19. 1898 (Ky. Stat., § 4679a), there was no statute in Kentucky authorizing proceedings to condemn land for a telegraph line. *Postal Tel. Cable Co. v. Mobile & O. R. Co.*, Ky. (54 S. W. Rep. 727; 21 Ky. Law Rep. 1188). In construing statutes and applying the common law principles, telephone companies will be given the same right of eminent domain as is given to telegraph

companies, unless express statutory provisions govern the case. *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334 (79 N. W. Rep. 315); *San Antonio & A. P. Ry. Co. v. Southwestern Telegraph & Telephone Co.*, Tex. Civ. App. (56 S. W. Rep. 201); *San Antonio & A. P. Ry. Co. v. Southwestern Telegraph & Telephone Co.*, 93 Tex. 313 (55 S. W. Rep. 117; 77 Am. St. Rep. 884). In the last case the court say: "The term 'telegraph' has been held in the following cases to include telephones: *Franklin v. Telephone Co.*, 69 Ia. 97 (28 N. W. Rep. 461); *Iowa Union Tel. Co. v. Board of Equalization*, 67 Ia. 250 (25 N. W. Rep. 155); *Wisconsin Tel. Co. v. City of Oshkosh*, 62 Wis. 32 (21 N. W. Rep. 828); *Duke v. Telephone Co.*, 53 N. J. L. 341 (21 Atl. Rep. 460); *Attorney General v. Edison Tel. Co.*, 6 Q. B. Div. 244; *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334 (79 N. W. Rep. 315). Each of the cases holds that the word 'telegraph,' when used in a statute, includes the telephone, but the two cases of *Attorney General v. Edison Telephone Co.*, 6 Q. B. Div. 244, and *Duke v. Telephone Co.*, 53 N. J. L. 341 (21 Atl. Rep. 460), are the most directly in point."

**Sec. 218. Appropriation of land for private ways and ditches.** The fact that a road for which land is sought to be appropriated may accommodate but a limited portion of the public, or even but a single family, is held to be no objection to the validity of the law providing for the condemnation where the road when laid out will be open to all who desire to use it. *Fanning v. Gilliland*, 37 Or. 369 (61 Pac. Rep. 636). See *Ballards' Law of Real Prop.*, Vol. VII, § 215. Cal. Stat. 1881, p. 15, providing that land may be appropriated "for a ditch, drain or other water course" upon the petition of two or more owners made to the board of supervisors "if the supervisors shall find that the construction of the ditch would be conducive to the general welfare of the owners of the land so petitioning." is held unconstitutional on the ground that the use contemplated is not a "public use" within the meaning of Cal. Const., art. 1, § 14. *Nickey v. Stearns Ranchos Co.*, 126 Cal. 150 (58 Pac. Rep. 459). Citing, *Johnson v. Schmidt*, 90 Wis. 30 (*Ballards' Law of Real Prop.*, Vol. IV, §§ 216-218). New York Const. 1894, art. 1, § 7, authorizing the passage of general laws permitting owners or



occupants of agricultural lands to construct certain ditches on the lands of others under proper restrictions, and on payment of just compensation, is in violation of the federal constitution (Const. U. S. Amend., art. 14), as depriving a person of property without due process of law, in that it authorizes a citizen to take property by the exercise of the right of eminent domain primarily for his own benefit, not sanctioned as a public use, either by long acquiescence or by judicial or legislative precedent. *In re Tuthill*, 163 N. Y. 133 (57 N. E. Rep. 303; 79 Am. St. Rep. 574; 49 L. R. A. 781, and note collating authorities on this subject).

**Sec. 219. Appropriation of land for irrigation.** Land may be taken for irrigation purposes. *Albuquerque Land & Irr. Co. v. Gutierrez*, N. M. (61 Pac. Rep. 357). The court say: "That lands condemned and used for the right of way of reservoirs, canals, ditches and pipe lines, for the purposes specified in the act above referred to, are for a public purpose, is too plain to require extended discussion. Congress has liberally granted this right over the public domain for the purpose of the construction of railroads and for other public uses, and state and territorial legislatures have granted this right for purposes of irrigation, railroads, public roads, and for other purposes. In arid regions the construction of systems of reservoirs, canals and ditches for the use of the public in irrigating lands is certainly as much for a public purpose as railroads or public roads, and authority to exercise the right of eminent domain is even more of a necessity than for such purposes. *Broder v. Mining Co.*, 101 U. S. 274 (25 L. Ed. 790); *Irrigation Dist. v. Bradley*, 164 U. S. 112 (17 Sup. Ct. Rep. 56; 41 L. Ed. 369); *Lumbering Co. v. Johnson*, 30 Or. 205 (46 Pac. Rep. 799; 34 L. R. A. 368; 60 Am. St. Rep. 818); *In re Madera Irr. Dist.*, 92 Cal. 296, 341 (28 Pac. Rep. 272, 675; 14 L. R. A. 762; 27 Am. St. Rep. 106); *Oury v. Goodwin*, Ariz. (26 Pac. Rep. 377)."

**Sec. 220. Appropriation of land for railroad stations.** A statute (Tenn. Laws 1893, ch. 11) authorizing the creation of railroad terminal corporations "to facilitate the public convenience and safety in the transmission of railroad passengers and freight, and to prevent unnecessary expense, in-

convenience and loss to the public," and giving to such corporations the right of eminent domain, is constitutional, regardless of the fact that such corporations, in the construction of its depots, may provide for the accommodation of the public by maintaining a hotel, restaurant and news stand, and although all their operations are for private profit. *Ryan v. Louisville & N. Ter. Co.*, 102 Tenn, 111 (50 S. W. Rep. 744; 45 L. R. A. 303). The court say: "Is the use contemplated by chapter 11 of the Acts of 1893 a public use? If so, then the defendant in error, so far as this question is concerned is entitled on this record to the judgment of condemnation, pronounced in the circuit court. That the legislature regarded the use as a public use, and by necessary implication so declared it, is evident. This, however, is not conclusive. The necessity for and the expediency of the exercise of the right of eminent domain are questions political in their nature, and, when it has been once determined by the legislative branch of the government that they exist, this determination is conclusive. *Cooley*, Const. Lim. 538; *Anderson v. Tubeville*, 6 Cold. 161. And while the legislature must, in the first instance, pass on the use, and fix its character, and while its recognition of the use as a public necessity is entitled everywhere to the benefit of strong presumptions—*Englewood R. Co.'s Appeal*, 79 Pa. St. 257; *Varner v. Martin*, 21 W. Va. 534.—yet the duty is devolved on the courts in the last resort of determining whether the particular use is a public use, within the legal meaning of the term—*Mills*, Em. Dom., § 10; *Lewis*, Em. Dom., § 158; 3 *Elliott*, R. R., § 952. The constitution does not define a public use. It simply provides that no man's property shall be 'taken or applied to public use \* \* \* without just compensation being made therefor,' clearly implying that it shall not be taken for a private use under any conditions. So far as we have discovered, other state constitutions in this regard are similar to ours. The courts have equally avoided a definition, lest it prove an embarrassment in subsequent cases, and work mischief in practical application. *Lewis*, Em. Dom., § 159. They have not sought to fix a positive standard for the measurement of a public use, and in the nature of the subject possibly could not do so. *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 45 Neb. 884 (64 N. W. Rep. 343; 50 Am. St. Rep. 585; 29 L. R. A.

853). However, even with this lack, the subject is not at large. It has been so long, and in such a variety of cases, a matter of judicial inquiry, there is now little difficulty in assigning a particular case to its proper place, and confining the right of eminent domain within natural boundaries.

"The term 'public use' is a flexible one. It varies and expands with the growing needs of a more complex social order. Many improvements universally recognized as impressed with a public use were nonexistent a few years ago. The possibility of railroads was not dreamed of in a past not very remote, yet, when they came, the courts, recognizing the important part they were to perform in supplying a public want, did not hesitate to take control of them as quasi governmental agents, and extend to them the right of eminent domain, in order to equip them thoroughly to discharge the duties to the community which followed their grant of franchises. This is equally true as to other appliances which now form important parts of a rapidly widening system of social and commercial intercommunication. So it may be said at the present time that 'anything' which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities"—*Stewart v. Railway Co.*, 65 Minn. 515 (68 N. W. Rep. 208),—and of which the general public, under reasonable regulations, will have a definite and fixed use, independent of the will of the party in whom title is vested, would be a public use. *Mills, Em. Dom.*, § 11. A few cases, taken from the many, serving to illustrate this statement, will be referred to. Grain elevators, found so necessary in the handling and shipment of grain, and in its transfer from the producer to the consumer—*Munn v. Illinois*, 94 U. S. 113; *Brass v. North Dakota*, 153 U. S. 391 (14 Sup. Ct. Rep. 857);—the erection of passenger and freight stations—*Rand. Em. Dom.*, §§ 170, 184; *Mills, Em. Dom.*, § 59;—railroad repair shops—*Railroad Co. v. Muder*, 49 Mo. 165; *Railroad Co. v. Raymond*, 53 Cal. 223;—a spur track to a grain elevator and to a stock elevator—*Clarke v. Blackmar*, 47 N. Y. 150; *Fisher v. Railroad Co.*, 104 Ill. 323;—the erection of a depot—*Giesy v. Railroad Co.*, 4 O. St. 308;—the extension of telegraph and telephone lines intended for the public service—*Trenton & N. B. Turnpike Co. v. American & E. Commercial News Co.*, 43 N. J. L. 381; *Pierce v. Drew*, 136 Mass. 75 (49 Am. Rep. 7); *New Orleans*,

M. & T. R. Co. v. Southern & A. Tel. Co., 53 Ala. 211; Mobile & O. R. Co. v. Postal Tel. Cable Co., 101 Tenn. 62 (46 S. W. Rep. 571; 41 L. R. A. 403)—have been held the subjects of public use."

**Sec. 221. Power of city to appropriate easement of light, air and view for public park by restricting height of buildings.** The restriction of the height of buildings adjacent to a public square, made by Mass. Stat. 1898, ch. 452, if intended to benefit the public by promoting the beauty and attractiveness of a public park and preventing unreasonable encroachments upon the light and air which it had previously received, justifies the expenditure of public money to pay compensation for property rights thereby injured by thus creating an easement of light, air and view, annexing it to the park in the exercise of eminent domain. Attorney General v. Williams, 174 Mass. 476 (55 N. E. Rep. 77; 47 L. R. A. 314). The court say: "The first question raised by the report is whether the statute is constitutional. The streets mentioned in the statute are adjacent to Copley Square. On the case as now presented, we must assume that Copley Square, in the language of the information, 'is an open square and a public park, intended for the use, benefit, and health of the public, and is surrounded by buildings devoted to religious, charitable and educational purposes, some of which contain books, manuscripts, and works of art of great value, many of which are in their nature irreplaceable.' Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments, in the exercise of the police power, for the safety, comfort and convenience of the people, and for the benefit of property owners generally. The right to make such regulations is too well established to be questioned. Salem v. Maynes, 123 Mass. 372; Inhabitants of Watertown v. Mayo, 109 Mass. 315 (12 Am. Rep. 694); Sawyer v. Davis, 136 Mass. 239 (49 Am. Rep. 27). See Talbot v. Hudson, 16 Gray, 417. In view of the kind of buildings erected on the streets about Copley Square, and the uses to which some of these buildings are put, it would be hard to say that this statute might not have been passed in the exercise of the police power, as other statutes regulating the erection of buildings in cities are commonly passed. But it differs from most statutes relative to this sub-

ject, in providing compensation to persons injured in their property by the limitations which it creates. In this respect it conforms to the constitutional requirements for the taking of property by the right of eminent domain. Looking to all its provisions in connection with the place to which they apply, it seems to have been intended as a taking of rights in property for the benefit of the public who use Copley Square. It adds to the public park rights in light and air, and in the view over adjacent land above the line to which buildings may be erected. These rights are in the nature of an easement created by the statute and annexed to the park. Ample provision is made for compensation to the owners of the servient estates. In all respects the statute is in accordance with the laws regulating the taking of property by right of eminent domain, if the legislature properly could determine that the preservation or improvement of the park in this particular was for a public use. The uses which should be deemed public in reference to the right of the legislature to compel an individual to part with his property for a compensation, and to authorize or direct taxation to pay for it, are being enlarged and extended with the progress of the people in education and refinement. Many things which a century ago were luxuries, or were altogether unknown, have now become necessities. It is only within a few years that lands have been taken in this country for public parks. Now the right to take land for this purpose is generally recognized and frequently exercised. *Foster v. Commissioners*, 133 Mass. 321; *Shoemaker v. United States*, 147 U. S. 282 (13 Sup. Ct. Rep. 361). Many statutes have been passed in this commonwealth allowing taxation for purposes affecting the health, comfort, pleasure and recreation of the people, and thus conducing to their welfare. In *Kingman v. City of Brockton*, 153 Mass. 255 (26 N. E. Rep. 998; 11 L. R. A. 123), the court said, referring to a statute authorizing the raising of money by taxation for the erection of a memorial hall: 'The statute \* \* \* may be vindicated on the same ground as statutes authorizing the raising of money for monuments, statues, gates or arches, celebrations, publication of town histories, parks, roads leading to points of fine scenery, decorations upon public buildings, or other public ornaments or embellishments designed merely to promote the general welfare, either by providing fresh air, a public recreation, or by educating the public taste, or enforcing

sentiments of patriotism or respect for the memory of worthy individuals. The reasonable use of public money for such purposes has been sanctioned by several different statutes, and the constitutional right of the legislature to pass such statutes rests upon sound principles.' See, also, *Higginson v. Inhabitants of Nahant*, 11 Allen, 530, and *Hubbard v. Taunton*, 140 Mass. 467 (5 N. E. Rep. 157). In *Olmstead v. Camp*, 33 Conn. 551 (89 Am. Dec. 221), the court, in discussing the line between public and private uses, says: 'From the nature of the case, there can be no precise line. The power requires a degree of elasticity, to be capable of meeting new conditions and improvements and the ever-increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and, in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the court.' The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to minister, not only to the grosser senses, but also to the love of the beautiful in nature, in the varied forms which the change in seasons brings. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting, and, in the highest sense, educational. If wisely planned and properly cared for, they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them, to make them beautiful and enjoyable. Their aesthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not always justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed, and whose love of beauty is being cultivated. We have already quoted from the information the language in regard to the surroundings of the square. The counsel on both sides referred in argument to the well-known buildings which constitute these surroundings. Trinity Church, the Museum of Fine Arts, the Boston Public Library, the New Old South Church, the Second Church of Boston, and the buildings of the Massachusetts Institute of Technology all face the beholder who stands on Copley Square

and looks around him. Some of these buildings are public in the ordinary sense of the word, and some of the corporations which own them have been beneficiaries of the commonwealth on account of their quasi public character, and the public certainly feels an interest in them. It is argued by the defendants that the legislature, in passing this statute, was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of the owner. But if the legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the lawmaking power might not determine that it was not a matter of such public interest as to call for an expenditure of public money, and to justify the taking of private property. While such a determination should not be made without careful consideration, and while the growing tendency towards an enlargement of the field of public expenditure should be jealously watched and carefully held in check, a determination of this kind, once made by the legislature, cannot be lightly set aside."

**Sec. 222. Power of railroad company to acquire right to maintain a structure which otherwise would be a nuisance.** Construing and applying N. Y. Code Civ. Proc., §§ 3358, 3360, providing that "any right, interest or easement" in real property may be condemned upon due proof of the necessity of its acquisition for a public use, it is held that a railroad company, by payment of damages through condemnation proceedings, may acquire the right to maintain a turntable on its own premises, the use of which previously had been enjoined as a private nuisance. *Long Island R. Co. v. Garvey*, 159 N. Y. 334 (54 N. E. Rep. 60). The court say: "There may be a taking without a complete ouster, or a total assumption of possession; for, 'if the right of indefinite user is an essential element of absolute property or complete ownership, whatever physical interference annuls this right takes property, although the owner may still have left to him valuable rights' in the subject, but of a more limited and circumscribed nature. *Eaton v. Railroad Co.*, 51 N. H. 504 (12 Am. Rep.

147). 'Depriving an owner of property of one of its essential attributes is depriving him of his property, within the constitutional provision.' *People v. Otis*, 90 N. Y. 48, 52. 'Those proprietary rights, which are the only valuable attributes or ingredients of a landowner's property, may be taken from him, without an exportation or adverse personal occupation of that portion of the earth which is his. \* \* \* Property is taken when any one of those proprietary rights is taken of which property consists.' *Arimond v. Canal Co.*, 31 Wis. 316, 335. Garvey's 'right of not being injured in his real estate by an unreasonable use' by the plaintiff of its land 'was one of the proprietary rights of which his general and comprehensive rights of property was composed.' *Thompson v. Improvement Co.*, 54 N. H. 545. It was established by the judgment in the injunction suit, which appears in the record, that the operation of the turntable in the company's yard, with its aggravating accompaniments, was a nuisance, which physically interfered with the ordinary and comfortable enjoyment of private property. The company sought to condemn the privilege of continuing to thus interfere in the future, and do under the sanction of law that which it had previously done without right. It procured a decree establishing this as a right upon making compensation. This right of interference with Mr. Garvey's property, by jarring and shaking his dwelling house, causing smoke to penetrate the rooms occupied by his family, and casting dust, ashes and cinders upon the furniture therein, was in the nature of an easement in his land, as the servient estate, in favor of the land of the railroad company, as the dominant estate. It comes within the definition of an easement, as given by courts and commentators, when they say that it is a permanent privilege that enables the owner of land to do or maintain something on the adjoining land of another, which, although a benefit to the land of the former and a burden upon the land of the latter, is not inconsistent with general ownership. *Wiseman v. Lucksinger*, 84 N. Y. 31 (38 Am. Rep. 479); *Huntington v. Asher*, 96 N. Y. 604 (48 Am. Rep. 652); *Nellis v. Munson*, 108 N. Y. 453 (15 N. E. Rep. 739); *God. Easem.* 2; 2 Washb. Real Prop. (4th Ed.) 299; *Gale, Easem.* 5; 10 Am. & Eng. Enc. Law (2nd Ed.) 398."

**Sec. 223. As to what constitutes a taking.** The fact that one is put to an expense in changing the use of his prop-



erty so as to conform to a valid regulation made by the state in the exercise of its police power does not constitute a taking. *State v. Beardsley*, 108 Ia. 396 (79 N. W. Rep. 138). Under Pa. Const., art. 16, § 8, an injury to a private property or franchise entitles the owner to compensation, whether there be a taking or not. *Gumbes v. City of Philadelphia*, Pa. St.

(43 Atl. Rep. 88). Property is injured when its drainage materially is affected. *In re Chatham St.*, 191 Pa. St. 604 (43 Atl. Rep. 365). A municipal order directing a railroad company to change the grade of a street, which will injure adjacent property, does not constitute a taking of the property so as to give a right to an action for damages until such damage actually has accrued. *Dickerman v. New York, N. H. & H. R. Co.*, 72 Conn. 271 (44 Atl. Rep. 228). As to change of grade of street as a taking, see *Brand v. Multnomah Co.*, Or. (60 Pac. Rep. 390; 50 L. R. A. 389). A municipality which, by its negligent construction of a stand-pipe for a system of public waterworks, overflows the adjoining lands of another in such a manner as to interfere with his possession, to that extent, appropriates the land to a public use and is liable for the damages resulting from its acts. *Town of Norman v. Ince*, 8 Okla. 412 (58 Pac. Rep. 632).

**Sec. 224. Condemnation of land already appropriated to a public use—General principles.** As a general rule, land already devoted to a public use cannot be taken under general laws where the effect would be to extinguish a franchise; but if the taking would not materially injure the prior holder, the condemnation may be sustained. However, where a statute (Minn. Gen. Stat. 1894, § 2604) confers no express authority to condemn land already appropriated to another public use, but such authority must arise, if at all, by necessary implication, in order for it to exist there must be a reasonable and practical necessity for such a proceeding, not a necessity created by the corporation asserting the right that it may be inconvenienced, or a necessity arising out of a desire to economize unreasonably. *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334 (79 N. W. Rep. 315). The necessity for the second appropriation must be imperative; and the mere convenience or saving of expense to the party seeking the second appropriation is not sufficient to authorize it. *Scranton Gas & Water Co. v. Northern Coal & Iron Co.*,

192 Pa. St. 80 (43 Atl. Rep. 470; 73 Am. St. Rep. 798). A general grant to a town authorizing it to "take waters in any stream, lake or pond, in whole or in part," does not authorize it to take waters already appropriated to public use under prior legislative authority. *New Haven Water Co. v. Borough of Wallingford*, 72 Conn. 293 (44 Atl. Rep. 235). A corporation given the right to take either land or water by the right of eminent domain can take only what reasonably is necessary for the purpose for which it is permitted to take the property; and it cannot exclude another corporation from taking under the right of eminent domain such of the property as it does not need. *Framingham Water Co. v. Old Colony R. Co.*, 176 Mass. 404 (57 N. E. Rep. 680).

**Sec. 225. Appropriation of lands previously appropriated by railroad company—Telegraph and telephone lines.**

A road or street cannot be established across a railroad right of way except by proper condemnation proceeding in court, and by due process of law, awarding and paying the company just compensation; and an attempt by a municipality to appropriate a railroad right of way to such a use by mere order or ordinance is void. *St. Louis & S. F. R. Co. v. Gordon*, 157 Mo. 71 (57 S. W. Rep. 742). The fact that the continuation of a public street across the right of way of a railroad company will cause and necessitate the removal of a small coal shed belonging to the company, the change of a switch in line with the new street, and the re-arrangement of some of its tracks, does not show conclusively an essential impairment or an inconsistent use, and, standing alone, is not sufficient to defeat the right of the municipality to open the street. *Fohl v. Common Council*, 80 Minn. 67 (82 N. W. Rep. 1097). A railroad company cannot by condemnation proceedings acquire for its right of way lands already occupied by another railroad company for the same purpose, notwithstanding the fact that such occupant has not acquired from the owner of the fee the right to so use the land, either by condemnation proceedings or by conveyance of the title. *Union Terminal R. Co. v. Kansas City Belt Ry. Co.*, 9 Kan. App. 281 (60 Pac. Rep. 541). The court refer to *Mills, Em. Dom.*, § 47, and say: "It is there said, 'When different corporations desire the same location, the one that is prior in point of time is also prior in point of right, and the first location, if fol-

lowed by construction, operates to secure the prior right.' This statement of law by Mr. Mills is supported by the decisions of the courts in *Waterbury v. Railroad Co.*, 54 Barb. 388; *People v. New York & H. R. Co.*, 45 Barb. 73; *Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co.* (C. C.), 27 Fed. Rep. 770; *Railway Co. v. Alling*, 99 U. S. 463 (25 L. Ed. 438). In the case of *Sioux City & D. M. Ry. Co. v. Chicago, M. & St. P. Ry. Co.* (C. C.), 27 Fed. Rep. 770, it was held that a prior occupation by staking out the line of road so as to indicate its permanent location was such an appropriation as deprived another road of the right to acquire the land subject to the right of way, and thus defeat the construction by the prior occupant. In that case there was a mere survey,—a permanent location; the title to the right of way not being acquired from the owner. The rival company obtained title to the land from the owner by deed, knowing that the line of its rival had been located thereon." A railroad corporation, having secured a franchise and right of way for the purpose of constructing its tracks upon a locus publicus of a city, has the right to expropriate from another railroad corporation sufficient clearance space to enable it to pass its trains free of obstructions and hindrance from the latter, if the use thereof be not of such a character as to be indispensable to the movement and operation of its own trains or its other business. *Shreveport & R. R. V. Ry. Co. v. St. Louis S. W. Ry. Co.*, 51 La. Ann. 814 (25 So. Rep. 424).

U. S. Rev. Stat., §§ 5263, 5268, 5269, authorizing telegraph companies, upon complying with the statute, to construct and maintain their lines along and over all post roads of the United States, apply likewise to telephone companies, but they do not confer upon a company of either class the right to occupy the right of way of a railroad with its line without the consent of the railroad or a contract with a prior owner which is binding upon it. *Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 76 Minn. 334 (79 N. W. Rep. 315). Va. Code. §§ 1287-1289, authorizing telegraph and telephone companies to construct and maintain lines "along and parallel to any of the railroads of the state," and providing for the acquisition of the right of way for such purposes by condemnation proceedings in case an agreement cannot be made with the land owner, authorizes the construction of such lines on a railroad right of way. *Postal Tel.*

Cable Co. v. Farmville & P. R. Co., 96 Va. 661 (32 S. E. Rep. 468).

**Sec. 226. Additional servitude—Telephone poles in streets.** An ordinary street railroad does not constitute an additional burden upon a city street. General Elec. Ry. Co. v. Chicago & W. I. R. Co., 184 Ill. 588 (56 N. E. Rep. 963). Mo. Rev. Stat. 1889, § 2742, construed and applied—condemnation of land for depot purposes—right of other railroad company to use the ground. Stevens v. St. Louis M. B. T. Ry. Co., 152 Mo. 212 (53 S. W. Rep. 1066). The placing of telephone poles in a street is an additional servitude, as against the abutting owner, not contemplated by the dedication of the land for street purposes, and cannot be imposed without his consent, nor without compensation if he requires it. Krueger v. Wisconsin Tel. Co., 106 Wis. 96 (81 N. W. Rep. 1041; 50 L. R. A. 298); East Tennessee Tel. Co. v. City of Russellville, Ky. (51 S. W. Rep. 308; 21 Ky. Law Rep. 305); Nicoll v. New York & N. J. Tel. Co., 62 N. J. L. 733 (42 Atl. Rep. 583; 72 Am. St. Rep. 666). In the first case cited, the court say: "On the general proposition of whether wires and poles are an additional burden for which the abutting owner is entitled to compensation there is, as stated, a wide divergence of opinion among text writers and courts. It is universally admitted that the legislature may subject the highway to this use. The question is whether it can be done without compensation to the owner of abutting land. As stated in Keasbey, Electric Wires, p. 71, the argument on one side is that the easement of highway is intercommunication, or the right to use the highway by the public generally for the purposes of intercommunication. Its purpose has been the transmission of intelligence, as well as for travel and transportation. It has been used by the post horse and mail wagon as well as the coach and the cart. When new modes of travel and new means of communication became necessary, the public have a right to use them, and they impose no new burden on the soil unless they are inconsistent with the old use; and, if the old use remains unimpaired, the owner of the soil has no reason to complain. Some of the leading cases supporting this view are here noted: Pierce v. Drew, 136 Mass. 75 (49 Am. Rep. 7); Irwin v. Telephone Co., 37 La. Ann. 63; Cater v. Exchange Co., 60 Minn. 539 (63 N. W. Rep. 111; 28 L. R. A.

310; 51 Am. St. Rep. 543); *Julia Bldg. Ass'n v. Bell Tel. Co.*, 88 Mo. 258 (57 Am. Rep. 398); *People v. Eaton*, 100 Mich. 208 (59 N. W. Rep. 145; 24 L. R. A. 721); *Hershfield v. Telephone Co.*, 12 Mont. 102 (29 Pac. Rep. 883); *Magee v. Overshiner*, 150 Ind. 127 (49 N. E. Rep. 951; 40 L. R. A. 370; 65 Am. St. Rep. 358). On the other hand, it is argued that the streets were intended primarily for travel and transportation, and that, although they were intended also for the transmission of intelligence, and the telephone and telegraph are used for that purpose, yet the mode of use is so wholly different from the old one, and requires such permanent occupation of the soil, that it cannot be supposed that the landowner ever contemplated such use and occupation. He has only given the right of use for a public highway, and, if he cannot complain of this permanent occupation, there is nothing to prevent the posts being put so as to form a barrier between his land and the street, and the wires from being so numerous as to be annoying and dangerous. The primary law of the highway is motion, and whether vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body which must pass along the highway, either on or over, or perhaps under it, but cannot permanently appropriate any part of it. The authorities supporting this view are so numerous that it may be said with confidence that the great weight of judicial opinion is in its favor. We note the following cases: *Eels v. Telegraph Co.*, 149 N. Y. 133 (38 N. E. Rep. 202; 25 L. R. A. 640); *Telegraph Co. v. Barnett*, 107 Ill. 507 (47 Am. Rep. 453); *Telegraph-Cable Co. v. Eaton*, 170 Ill. 513 (49 N. E. Rep. 365; 39 L. R. A. 722; 62 Am. St. Rep. 390); *Telegraph Co. v. Pearce*, 71 Md. 535 (18 Atl. Rep. 910; 7 L. R. A. 200); *Telegraph Co. v. Williams*, 86 Va. 696 (11 S. E. Rep. 106; 8 L. R. A. 429; 19 Am. St. Rep. 908); *Telephone Co. v. Mackinzie*, 74 Md. 36 (21 Atl. Rep. 690; 28 Am. St. Rep. 219); *Blashfield v. Telegraph Co.*, 71 Hun. 532 (24 N. Y. Supp. 1006); *Smith v. Telegraph Co.*, 2 Ohio Cir. Ct. Rep. 259; *Stowers v. Telegraph-Cable Co.*, 68 Miss. 559 (9 So. Rep. 356; 12 L. R. A. 864; 24 Am. St. Rep. 290); *Telegraph Co. v. Irvine (C. C.)*, 49 Fed. Rep. 113; *Nicoll v. Telephone Co.*, 62 N. J. L. 733 (42 Atl. Rep. 583; 72 Am. St. Rep. 666); *Hewett v. Telegraph Co.*, 13 Wash. Law Rep. 466. See *Halsey v. Railway Co.*, 47 N. J. Eq. 380 (20 Atl.

Rep. 859); *Sterling's Appeal*, 111 Pa. St. 35 (2 Atl. Rep. 105; 56 Am. Rep. 246); *Broome v. Telephone Co.*, 42 N. J. Eq. 141 (7 Atl. Rep. 851); *Jaynes v. Railway Co.*, 53 Neb. 631 (74 N. W. Rep. 67; 39 L. R. A. 751). In addition to the courts, the text writers quite uniformly subscribe to this doctrine. Mr. Lewis, in his work on Eminent Domain (§ 131), says: 'The lines of a telegraph or telephone company are on the same footing as the steam railroad. They form no part of the equipment of a public highway, and are entirely foreign to its use.' Another writer on the same subject says: 'And the sounder rule seems to be that the abutting owner ought to be compensated for all actual injury to his property, or the right to use the same.' *Tied. Mun. Corp.*, § 297. *Randolph on Eminent Domain* (§ 407), says that the prevailing opinion is that the plant of a telegraph or telephone company is an additional servitude. See, also, *Crosw. Elect.*, § 110; *Thomp.*, § 18; *Elliott, Roads & S.*, pp. 534, 535; 2 *Dill. Mun. Corp.*, § 698a. In view of this overwhelming array of courts and law writers in favor of the latter rule, and in view of the adoption by this court of the middle-ground doctrine mentioned in the *Hobart Case* [*Hobart v. Railroad Co.*, 27 Wis. 194 (9 Am. Rep. 461)], we feel compelled to drop into the ranks of the majority, and sanction this rule as the policy and law of this state. Every question and every argument bearing on the situation has been raised and used, and considered and determined in the cases cited; and nothing that we can say will add to their weight, or be likely to convince the doubting. The suggestion that the adoption of this rule will cripple or destroy the commerce of the state, is weighty, but the rights of the public, or of corporations engaged in conducting business of a public character, cannot be allowed to prevail over the rights of individuals, except in the way pointed out in the constitution. The fact that some of the cases mentioned were decided with reference to the location of poles on country roads does not lessen their weight. If it be a fact, as we believe it is, that in the dedication or condemnation of streets the taking and occupancy of a specific portion for permanent structures was not within the contemplation of the parties, then the argument of the greater rights of the public in city streets fails. The freedom of use and enjoyment of adjoining property have been interfered with, and a definite por-

tion of both streets and highway has been taken, contrary to the original purpose, and without compensation."

**Sec. 227. Compensation for property taken as a prerequisite to the taking.** Just compensation, to be ascertained, in the absence of agreement, by an impartial tribunal, is an absolute right belonging to the owner of the property taken, but it is not necessary to provide for payment in advance, if a certain, convenient and adequate source and means of payment is provided. *People v. Adirondack Ry. Co.*, 160 N. Y. 225 (54 N. E. Rep. 689). A statute (N. Y. Laws 1851, ch. 207, § 4, as amended by Laws 1894, ch. 712) authorizing the use of a stream for floating logs, which is so small as to require the aid of artificial means, without providing for the compensation of the owners of the beds of the stream, is unconstitutional. *De Camp v. Dix*, 159 N. Y. 436 (54 N. E. Rep. 63). Under Ala. Const., art. 14, § 7, giving a landowner the right to compensation before his property is taken or injured under the right of eminent domain, he may enjoin the taking of his property until compensation is made, regardless of any remedy at law by way of compensatory damages. *City Council of Montgomery v. Lemle*, 121 Ala. 609 (25 So. Rep. 919). In Wisconsin it is held that where a railroad company takes possession of land without paying to the owner thereof the damages awarded him in condemnation proceedings, and without his consent, he may have his remedy in equity to compel the company to pay the damages assessed. *Stoltz v. Milwaukee & L. W. R. Co.*, 104 Wis. 47 (80 N. W. Rep. 68).

**Sec. 228. Proceedings to condemn land—Jurisdiction—Complaint or petition—Showing necessity for condemnation.** It is not essential to the jurisdiction of the court that all the owners affected by an appropriation shall be brought into court, even as to land taken, but compensation may be ascertained separately. *Indiana, I. & I. R. Co. v. Conness*, 184 Ill. 178 (56 N. E. Rep. 402). Want of jurisdiction in the circuit court of condemnation proceedings is not cured by Miss. Const., § 147. *Board of Levee Com'rs v. Brooks*, 76 Miss. 635 (25 So. Rep. 358). Ala. Laws 1896-97, p. 1401, construed and applied—sufficiency of petition by water company to condemn land to prevent its source of water from

becoming polluted. *Columbus Waterworks Co. v. Long*, 121 Ala. 245 (25 So. Rep. 702). 3 How. Ann. Mich. Stat., § 3064c, construed and applied—description of property. *Smith v. City of Detroit*, 120 Mich. 572 (79 N. W. Rep. 808). The decision of the condemning party as to the necessity for condemnation will not be interfered with by the courts where there is nothing unreasonable in the location and condemnation. *Biddle v. Wayne Waterworks Co.*, 190 Pa. St. 94 (42 Atl. Rep. 380). Ill. Laws, 1899, p. 331, construed and applied—condemnation of property for street railroad—showing sufficient necessity therefor. *Dewey v. Chicago & M. Elec. Ry. Co.*, 184 Ill. 426 (56 N. E. Rep. 804). Particular evidence held sufficient to show inability of the condemning party to agree with the land owner as to his compensation. *Trotier v. St. Louis, B. & S. Ry. Co.*, 180 Ill. 471 (54 N. E. Rep. 487). 3 How. Ann. Mich. Stat., § 3064j, construed and applied—amendments. *Smith v. City of Detroit*, 120 Mich. 572 (79 N. W. Rep. 808).

**Sec. 229. Proceedings to condemn land—Notice—Opportunity to be heard—"Due process of law."** Notice of condemnation proceedings required by Wash. Laws 1875, ch. 50, § 11, must be given to both husband and wife where the property sought to be condemned is community property. *Chehalis Co. v. Ellingson*, 21 Wash. 638 (59 Pac. Rep. 485). A statute (Mo. Laws 1893, p. 62) which provides for the service of summons upon the filing of a petition to condemn, does not violate the constitutional provision against taking property without due process of law because it makes no provision for an additional notice of when the commissioners will view the premises and assess damages. *City of St. Joseph v. Geiwitz*, 148 Mo. 210 (49 S. W. Rep. 1000). A statute (Or. Laws 1889, p. 105) which authorizes a county court to declare an unnavigable stream a public highway and to appropriate property necessary for its improvement as such, without any provision for notice to the owner, or without giving him any right to a hearing until after a final judgment has been entered, taking his property and appropriating it to a public use, and then only the right, by an appeal, to be heard upon the question of damages alone, is void, for the reason that it authorizes the taking of property without due process of law.



Hood River Lumbering Co. v. Wasco County, 35 Or. 498 (57 Pac. Rep. 1017).

In discussing the nature of the power of eminent domain and what constitutes "due process of law" in its exercise, the Court of Appeals of New York say, in the case of *People v. Adirondack Ry. Co.*, 160 N. Y. 225 (54 N. E. Rep. 689): "The defendant does not attack the regularity of procedure on the part of the state, but contends that the act under which the state proceeded is void, because it violates both the federal and state constitutions. Its more specific contention is that said act is unconstitutional because it authorizes the seizure by the state of private property without due process of law, and without making compensation therefor. 'Due process of law,' sometimes called 'the law of the land,' is not defined by either constitution or by any statute, and judges of the highest standing and widest experience, in various jurisdictions, have pronounced it incapable of definition so exact as to fit all cases, and attempts to define have usually been confined to the facts of the case in hand. *Bertholf v. O'Reilly*, 74 N. Y. 509, 519 (30 Am. Rep. 323); *Davidson v. New Orleans*, 96 U. S. 97, 104. While to a reasonable extent it may be regulated by a statute, ordinarily it rests upon established customs, and a method of procedure having the sanction of settled usage is commonly regarded as due process of law. It does not necessarily mean a judicial proceeding, for a man may be lawfully deprived of his property through the power of taxation, or of the use of his property through the police power without the intervention of any court. *McMillen v. Anderson*, 95 U. S. 37, 41. In many cases due process of law is wanting when there is no opportunity for the person whose rights are affected to be heard, but this does not apply to the taking of private property by the state for public use through the power of eminent domain, except as to the subject of compensation, unless some statute requires a hearing. *Cooley Const. Lim.* 356.

"The power of taxation, the police power, and the power of eminent domain underlie the constitution, and rest upon necessity, because there can be no effective government without them. They are not conferred by the constitution, but exist because the state exists, and they are essential to its existence. They are not rights reserved, but rights inherent in the state as sovereign. While they may be limited and regulated by the

constitution, they exist independently of it, as a necessary attribute of sovereignty. They belong to the state because it is sovereign, and they are a necessity of government. The state cannot surrender them, because it cannot surrender a sovereign power. It cannot be a state without them. They are as enduring and indestructible as the state itself. Black, Const. Law, § 123; Cooley, Const. Lim. 524; Rand. Em. Dom. 77; Lewis, Em. Dom., § 3; Mills, Em. Dom., § 11. Each is a peculiar power, wholly independent of the others, and not one of them requires the intervention of a court for effective action by the state. In the case of eminent domain, when the state is not itself an actor, compensation for property taken, unless the amount is agreed upon, can be ascertained only through the aid of a court, but otherwise judicial action is unnecessary, except as provided by statute. State Const., art. 1, § 7.

The power of eminent domain is the right of the state, as sovereign, to take private property for public use upon making just compensation. The state has all the power of eminent domain there is, and all that any sovereign has, subject to the limitations of the constitution. Although exercised under our first constitution, it is not mentioned therein, and is now mentioned only for the purpose of limitation. The language of the revised constitution is as follows: 'No person \* \* \* shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation;' and 'when private property shall be taken for any public use, the compensation to be made therefor when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.' Const., art. 1, §§ 6, 7. This language, which presupposes the existence of the power outside of the constitution, simply regulates the right to use it. It does not confer the power, but, recognizing its existence, surrounds it with proper limitations. It prescribes no method of action, when the state acts for itself, but marks out certain boundaries, which may not be crossed, even by the state. Within those boundaries the state acting through that department which exerts the legislative power, may proceed at will, and the extent, method and necessity of exercising the power to take private property for public use may not be interfered with by either of the other departments of government. *Garrison v. City of New York*, 21 Wall,

196. All private property, both tangible and intangible, is subject to the right, including that already devoted to a public use, although the latter, as matter of policy rather than of right, is protected and favored by the state to some extent. *People v. Kerr*, 27 N. Y. 188; *In re City of Buffalo*, 68 N. Y. 167. While the state may delegate the power to a subject for a public use, it cannot permanently part with it as to any property under its jurisdiction, but may resume it at will, subject to property rights and the duty of paying therefor. There is no limitation upon the exercise of the power except that the use must be public, compensation must be made, and due process of law observed. *Secombe v. Railroad Co.*, 23 Wall. 108; *In re Fowler*, 53 N. Y. 60, 62.

"Now, what does the phrase, 'due process of law,' mean, when thus applied to the exercise of a sovereign power, and to the effort of government through that power to accomplish a great public purpose? Does it have the same meaning as when applied to the action of the state in punishing a man for crime, or of one individual in seeking to enforce a civil right against another? Due process of law necessarily varies with the facts of the case, and depends upon the necessity for safeguards against the exercise of arbitrary power. It consists in the observance of those safeguards which time and experience have shown are necessary to protect the citizen in the enjoyment of life, liberty and property. In public prosecutions, as well as private controversies, an opportunity to be heard is essential to protect private rights; but here we have a case where the state has the right to take a man's property against his will, although he has been guilty of no wrong. It is a case where, of necessity, if there is any action at all, it must be arbitrary. The state needs the property, and takes it, and, while the citizen cannot resist, he has the right to insist upon just compensation, to be ascertained by an impartial tribunal. It is a compulsory purchase by public authority, and the individual receives money in the place of the property taken. He has a right to his day in court on the question of compensation, but he has no right to a day in court on the question of appropriation by the state, unless some statute requires it. *In re Village of Middletown*, 82 N. Y. 196, 201. There is no necessity for any safeguard against taking, because the right to take is all there is of the power of eminent domain, and is necessarily conceded to exist when the existence of the power

is admitted. Safeguards become necessary only when the question of compensation is reached, and then the courts are careful to see that the owner receives all that he is entitled to. Until then the courts could not help him, unless some statutory right were invaded, as the method of taking is within the exclusive control of the legislature. If a statute requires judgment of condemnation, judgment must be had accordingly before the property can be taken, but otherwise a certificate of condemnation by an executive officer, followed by payment, satisfies every requirement of the constitution. If the use is not public, the statute authorizing condemnation is void, but this question of law need not be settled in the proceeding to take, as it can be raised by the property owner in a variety of ways. It would be the same in effect as if the attempt to condemn had been made without any statute whatever, and an action of trespass against those who undertook to take possession of the property would settle the question. *Wheelock v. Young*, 4 Wend. 648."

**Sec. 230. Proceedings to condemn land—Jury trial—View of premises.** The right to a jury trial in condemnation proceedings does not exist in the absence of a statute giving it. *City of St. Joseph v. Geiwitz*, 148 Mo. 210 (49 S. W. Rep. 1000). A juror in condemnation proceedings under Ill. Rev. Stat., ch. 47, §§ 2, 3, necessarily need not be a freeholder. *Indiana, I. & I. R. Co. v. Stauber*, 185 Ill. 9 (56 N. E. Rep. 1079). View of the premises by the jury is for the purpose of affording them evidence upon which they may act, and not merely better to enable them to construe and apply the evidence adduced in court. *Chicago, R. I. & P. Ry. Co. v. Farwell*, 59 Neb. 544 (81 N. W. Rep. 440). In Louisiana it is held that the finding of a jury of freeholders in appropriation proceedings as to the compensation to be paid the owner of property, is entitled to the greatest of weight. *Kansas City, S. & G. Ry. Co. v. Smith's Heirs*, 51 La. Ann. 1079 (25 So. Rep. 955). The finding of a jury which has had a personal view of the premises will not be disturbed on the ground that the damages allowed are excessive, unless such finding palpably is against the weight of evidence. *Chicago Ter. Transf. R. Co. v. Bugbee*, 184 Ill. 353 (56 N. E. Rep. 386); *Rock Island & E. I. Ry. Co. v. Gordon*, 184 Ill. 456 (56 N. E. Rep. 810); *Indi-*

at 2, I. & I. R. Co. v. Stauber, 185 Ill. 9 (56 N. E. Rep. 1079); City of Ludlow v. Mackintosh, Ky. (53 S. W. Rep. 524; 21 Ky. Law Rep. 924).

**Sec. 231. Proceedings to condemn land—Recovery of interest.** Interest can be recovered only from the time possession is taken by the condemning party, where a statute (Mass. Pub. Stat., ch. 49, § 14) prohibits the ordering of the payment of the damages before that time. Pegler v. Inhabitants of Hyde Park, 176 Mass. 101 (57 N. E. Rep. 327). Damages for detention of payment cannot be demanded in lieu of interest when the delay was due to the fact that the demand made was oppressive and unreasonable. Philadelphia Ball Club v. City of Philadelphia, 192 Pa. St. 632 (44 Atl. Rep. 265; 73 Am. St. Rep. 835; 46 L. R. A. 724).

**Sec. 232. Proceedings to condemn land—Abandonment by condemning party.** Where a statute (14 Del. Laws, ch. 513, p. 561) gives a railroad company power to survey, locate and purchase land for its right of way, and provides for its acquiring such lands by condemnation proceedings at its own expense where it is unable to agree with the owner or owners, its right to use and enjoy lands condemned to vest upon its payment of the damages assessed, it is held that the company, after having a certain route for its proposed road surveyed and condemnation proceedings instituted and damages assessed for certain lands along said route, may abandon this route, select another and different route running over a portion of the lands embraced in the other route and institute new condemnation proceedings on such altered route. Williams v. Odessa & M. Ry. Co., 7 Del. Ch. 303 (44 Atl. Rep. 821). See opinion for exhaustive collation and comparison of cases on this subject. In Maine it is held that in case of the appropriation of property by a water company, after the damages have been finally adjudicated by the county commissioners, it cannot avoid payment of such damages by abandonment, or by an attempted abandonment, of the property taken. Furbish v. County Com'rs, 93 Me. 117 (44 Atl. Rep. 364). The court say: "But we regard it settled by the great weight of authority that, after such proceed-

ings have been perfected, and the damages for the land taken have been finally ascertained and adjudged by the proper tribunal, the corporation thereby acquires a vested right to hold and use the land taken on payment of the compensation awarded, and that the landowner acquires a vested right to have and recover the damages awarded. The corporation cannot evade payment of damages, by revoking the proceedings, or by surrendering the land, without the consent and agreement of the landowner. The English courts have maintained the doctrine, as well in public street improvements as in railway and other corporations, that where, by act of parliament, street commissioners or the managers of railway or other corporations are authorized to acquire title to land by appraisal after giving notice to the owner to treat or submit to an appraisal, the mere giving the notice is an election to purchase at an appraisal; and that this election, being binding on the owner of the land, is also binding on the street commissioners or corporation. *Rex v. Manchester Com'rs*, 4 Barn. & A. 335; *Rex v. Market Co.*, 4 Barn. & A. 327; *Stone v. Railway Co.*, 4 Mylne & C. 122; *Walker v. Railway Co.*, 6 Hare, 594. In *Hallock v. Franklin Co.*, 2 Metc. (Mass.) 559, the law is thus stated by Shaw, C. J.: 'By the judgment establishing and locating the highway, before any act done towards fitting it for use, the rights of the parties are fixed and vested, and the public acquire a right to the public easement; and the right of the owner of the land over which it passes, to his compensation is complete.' The same learned jurist had previously said in *Harlington v. Commissioners*, 22 Pick. 267 (33 Am. Dec. 741): 'The court are of opinion that, when the highway is once completely established, and the damages of the land once settled, by the modes pointed out by law, the right of the public to a perpetual easement in the land for a highway \* \* \* becomes complete, and the right of the owner to his damages or compensation for the lien or qualified right acquired by the public in his land becomes complete.' The law thus laid down has been sustained by numerous cases in Massachusetts, the latest case being that of *Imbescheid v. Railroad Co.*, 171 Mass. 210 (50 N. E. Rep. 609), in which an array of authorities of that state are cited.

In New York the court has maintained the doctrine

above laid down. In *People v. Gaslight Co.*, 78 N. Y. 56, the court held that when land has been taken for public uses under the right of eminent domain, and the proceedings have so far progressed that the amount of compensation to the owner has been fixed as a finality, the proceedings cannot be discontinued or abandoned, and the owner has a vested right to the compensation. See cases there cited.

It is held in New Jersey—*Butler v. Commissioners*, 39 N. J. L. 665—that, when the amount of compensation for land taken is once fixed by the tribunal which the law has provided, even the legislature cannot authorize postponement of payment. Reed, J., says: 'I am clear that, when the amount of compensation is once fixed, the owner, as constrained vendor, is entitled to recover his price.'

Mills, Em. Dom. § 319, states the rule as follows: 'The ancient rule was that, when a street had been laid out, the damages were due, although no entry had been made for the purpose of construction. The rights of the parties were considered as fixed by the laying out, although the highway was forthwith discontinued, or was never, in fact, opened.'"

**Sec. 233. Proceedings to condemn land—Leased or mortgaged premises.** A lessee is entitled to recover damages occasioned to his estate by the taking of the premises under the right of eminent domain. *Witman v. City of Reading*, 191 Pa. St. 134 (43 Atl. Rep. 140). The fact that a lessee has cancelled and surrendered to his lessor his lease properly cannot be considered in estimating such lessee's damages, where there was no assignment of his claim for damages with such cancellation; but he is entitled to recover in the condemnation proceedings compensation for all injury to his interest. *Pegler v. Inhabitants of Hyde Park*, 176 Mass. 101 (57 N. E. Rep. 327). The owners of the fee in mortgaged lands who otherwise would be entitled to an award of damages for an appropriation of an easement therein are proper parties to a petition by the mortgagees to have the liens of their mortgages adjudged to be liens upon the money awarded as damages. *Lumbermen's Ins. Co. v. City of St. Paul*, 77 Minn. 410 (80 N. W. Rep. 357).

**Sec. 234. Proceedings to condemn land—Appeal.**

Where the subject-matter is within the jurisdiction of the court certiorari will not lie to quash a judgment denying the right to condemn property in eminent domain proceedings for errors which may be corrected by appeal or writ of error, although the latter remedies are inadequate because too slow. *State v. Shelton*, 154 Mo. 670 (55 S. W. Rep. 1008; 50 L. R. A. 798). Ia. Code 1873, § 1257, construed and applied—trial upon appeal from proceedings to condemn property for a railroad. *Burns v. Chicago, Ft. M. & D. M. Ry. Co.*, 110 Ia. 385 (81 N. W. Rep. 794). 2 N. J. Gen. Stat., p. 1386, construed and applied—notice of appeal. *Nicoll v. New York & N. J. Tel. Co.*, 62 N. J. L. 733 (42 Atl. Rep. 583; 72 Am. St. Rep. 666). 2 Bal. Ann. Wash. Codes & Stat., §§ 5643, 5645, construed and applied—appeal in condemnation proceedings—what questions will be considered. *Western American Co. v. St. Ann Co.*, 22 Wash. 158 (60 Pac. Rep. 158).

**Sec. 235. Proceedings to condemn land—Statutes construed.**

Ala. Code 1896, § 1719, construed and applied—proceedings upon rendition of verdict. *Mobile & O. R. Co. v. Hester*, 122 Ala. 249 (25 So. Rep. 220). Ill. Rev. Stat., ch. 131a, §§ 2, 3, construed and applied—condemnation of land by street railway company. *Harvey v. Aurora & G. Ry. Co.*, 186 Ill. 283 (57 N. E. Rep. 857). Miss. Const. 1890, § 233; Laws 1884, ch. 169, § 3, construed and applied—appropriation of land for levee—jurisdiction of circuit court—appeal. *Richardson v. Board of Miss. Levee Com'rs*, 77 Miss. 518 (26 So. Rep. 963). N. Y. Code Civ. Proc., §§ 3370, 3375, construed and applied—jurisdiction of commissioners—appeal. *Long Island R. Co. v. Garvey*, 159 N. Y. 334 (54 N. E. Rep. 60). Construing and applying Wash. Laws 1885-86, p. 270, § 100, providing that appraisers appointed in condemnation proceedings "shall view the premises and receive any legal evidence and may be adjourned from day to day, but shall make their report within thirty days from the time of their appointment," it is held that proceedings in which the report of the appraisers was not offered until seventy days after their appointment are void, and that neither the record thereof nor evidence of possession thereunder is admissible in subsequent pro-



ceedings to condemn the same property. *City of Seattle v. Fidelity Trust Co.*, 22 Wash. 154 (60 Pac. Rep. 133). Wis. Laws 1887, ch. 162, subch. 6, § 6, as amended by Laws 1889, ch. 492, § 6, construed and applied—condemnation of property by city of La Crosse for street—assessment of damages and benefits and making of charge for difference. *Koller v. City of La Crosse*, 106 Wis. 369 (82 N. W. Rep. 341).

**Sec. 236. Proceedings to condemn land—Evidence and instructions.** Evidence of previous negotiations and offers between the parties is not admissible. *St. Louis & K. C. Ry. Co. v. Eby*, 152 Mo. 606 (54 S. W. Rep. 472). Where a mineral deposit on lands is sought to be appropriated for ballast, evidence tending to show that it has no market value is admissible. *Morris & Essex Mut. Coal Co. v. Delaware, L. & W. R. Co.*, 190 Pa. St. 448 (42 Atl. Rep. 883). In determining the value of land taken, it is improper to admit evidence of the selling price of other estates unless the similarity of the estates sold to that in question is such as to make the evidence helpful without the aid of testimony from experts. *Old Colony R. Co. v. F. P. Robinson Co.*, 176 Mass. 387 (57 N. E. Rep. 670). When an injury is done to property which is not commonly bought and sold, and a case arises in which the amount of that injury must be ascertained, it is proper to allow testimony to be given of its value for the specified purpose for which it is used, or for which it is specially adapted, and to allow that testimony to be given by persons who show themselves qualified to testify thereto from knowledge derived from experience in their own business, in which they have dealt with similar property. *Cochrane v. Commonwealth*, 175 Mass. 299 (56 N. E. Rep. 610; 78 Am. St. Rep. 491). In determining the damages to be assessed for the condemnation of land for a belt line railroad, it is improper to admit evidence of the effect upon the value of land of a similar railroad constructed several years before at a place four miles away. *Chicago Ter. Trans. R. Co. v. Bugbee*, 184 Ill. 353 (56 N. E. Rep. 386). For particular cases determining the applicability of instructions, see *Rock Island & E. I. Ry. Co. v. Gordon*, 184 Ill. 456 (56 N. E.

Rep. 810); *City of Los Angeles v. Pomeroy*, 124 Cal. 597 (57 Pac. Rep. 585).

**Sec. 237. Proceedings to condemn land—Miscellaneous notes.** An order condemning lands not embraced or described in the petition filed in the condemnation proceedings is void. *Hobbs v. Nashville, C. & St. L. Ry. Co.*, 122 Ala. 602 (26 So. Rep. 139). A defendant in an action brought to restrain a trespass and for damages cannot have a condemnation of the land for a public use by means of a counterclaim in such action. *Peterson v. Bean*, 22 Utah, 43 (61 Pac. Rep. 213). A party to condemnation proceedings is entitled to an assessment of the damage to all his interests in real estate affected by the appropriation. *Indiana, I. & I. R. Co. v. Conness*, 184 Ill. 178 (56 N. E. Rep. 402). A finding by a court specially as to the ownership of all the lands sought to be condemned and as to all the land about which any issue was presented, excludes the idea of any ownership in a defendant who is not mentioned. *Alameda County v. Crocker*, 125 Cal. 101 (57 Pac. Rep. 766). A verdict finding an amount of compensation in a proceeding by a railroad company to condemn land that is so high that it must be attributed to prejudice, passion, bias, partiality, or mistake of law or judgment, will be set aside. *Norfolk & W. R. Co. v. Nighbert*, 46 W. Va. 202 (32 S. E. Rep. 1032). A judgment in condemnation proceedings need not contain a formal decree condemning the land for public use and vesting the easement in the plaintiff. *St. Louis & K. C. Ry. Co. v. Donovan*, 149 Mo. 93 (50 S. W. Rep. 286). The filing of a map of the proposed route of a railroad company, the effect of which is to give it a prior right to such route as against other companies, does not give it any lien or interest in the land which entitles it to claim a right to notice and compensation in subsequent condemnation proceedings for the same land brought by the state. *People v. Adirondack Ry. Co.*, 160 N. Y. 225 (54 N. E. Rep. 689). The fact that one of two persons chosen to appraise the value of land, and determine the sum at which the owner shall convey and a railroad company shall pay for it for right of way purposes, acts from motives of partiality and bias in favor of the landowner, or misconceives his duty by supposing himself

the agent or representative of such owner for the purpose of securing for him the highest possible price, and through whose partiality and misconception of duty the property is appraised at a sum largely in excess of its real value, constitutes sufficient ground for vacating the award or appraisal, or for defending an action brought for its enforcement. *Downey v. Atchison, T. & S. F. R. Co.*, 60 Kan. 499 (57 Pac. Rep. 101).

**Sec. 238. Measure of damages—Elements considered.** The value of one's occupation of property after it has been taken for a public use cannot be set off against his claim for damages. *Pegler v. Inhabitants of Hyde Park*, 176 Mass. 101 (57 N. E. Rep. 327). The valuation of property injured in the exercise of eminent domain must be made immediately before and immediately after the damage is inflicted, and the measure of damages recoverable is the difference between those valuations, unaffected by any subsequent change in the circumstances or condition of the property. *Philadelphia Ball Club v. City of Philadelphia*, 192 Pa. St. 632 (44 Atl. Rep. 265; 73 Am. St. Rep. 835; 46 L. R. A. 724). The measure of damages for land taken is not its value for a certain specific purpose for which it is being used, but its general market value; as determined by its adaptability to any and all legitimate purposes to which it might be applied; nor is it proper to consider an inflation in the rental value of the property taken, on account of its use for an unlawful purpose. *McKinney v. Mayor, etc., of Nashville*, 102 Tenn. 131 (52 S. W. Rep. 781; 73 Am. St. Rep. 859). In an action for damages for injury to property by a construction of public works, the creation of noise and dust, the invasion of privacy, the deprivation of light and means of access, the burden of additional fencing, and like matters, are to be taken into consideration as affecting its market value. *Shano v. Fifth Ave. & H. St. Bridge Co.*, 189 Pa. St. 245 (42 Atl. Rep. 128; 69 Am. St. Rep. 808). In estimating the damages accruing to the lessee of a ball park on account of the municipality changing the grade of streets adjacent thereto, the anticipated profits for the remainder of the lease cannot be considered. *Philadelphia Ball Club v. City of Philadelphia*, 192 Pa. St. 632 (44 Atl. Rep. 265; 73 Am. St. Rep. 835; 46 L. R. A. 724). The fact

that an abutting owner whose dwelling fronts upon a street may recover damages resulting to it from the construction of a bridge approach in the street, does not entitle him to recover damages to his adjacent property which fronts upon a cross street and alley, and which was acquired at different times and held by him for rental purposes. *Gibson v. Fifth Ave. & H. St. Bridge Co.*, 192 Pa. St. 55 (43 Atl. Rep. 339; 73 Am. St. Rep. 795). Where, in estimates of damages, witnesses included improper elements, and the extent of these matters was shown by cross-examination, and, at the instance of plaintiff, excluded from the jury, and the true measure of damages given by instructions, plaintiff has no right to complain. *St. Louis & K. C. Ry. Co. v. Donovan*, 149 Mo. 93 (50 S. W. Rep. 286). As to the measure of damages for the condemnation of land by a city to enable it to establish a waterworks for the purpose of supplying water to its inhabitants, see *City of Los Angeles v. Pomeroy*, 124 Cal. 597 (57 Pac. Rep. 585).

**Sec. 239. Measures of damages—Benefits considered.**

Benefits to the party whose land is sought to be condemned should be considered in assessing damages. *City of St. Joseph v. Geiwitz*, 148 Mo. 210 (49 S. W. Rep. 1000). Where a steam railroad, occupying a portion of a street, changed its tracks nearer to plaintiff's property, to enable a street railway to lay its tracks thereon, which necessitated the removal of the tracks of another street railway on the street, farther away from plaintiff's property, the benefits derived from such removal cannot be set off against plaintiff's damages for the change in the location of the tracks of the steam railroad, since plaintiff, not being entitled to compensation for the use of the street by a street railway, is not benefited, in contemplation of law, by its removal. *Richmond Traction Co. v. Murphy*, 98 Va. 104 (34 S. E. Rep. 982). Construing and applying Ohio Const., art 1, § 19, providing that compensation for private property taken for a public use "shall be assessed by a jury without deduction for benefits to any property of the owner," it is held that compensation paid to a landowner for lands taken by appropriation proceedings to open a street cannot be assessed back upon the lands of the owner remaining after such taking, under the guise of benefits; nor can the

costs and expenses incurred in such proceeding be so assessed. *Cincinnati, L. & N. Ry. Co. v. City of Cincinnati*, 62 O. St. 465 (57 N. E. Rep. 229; 49 L. R. A. 566). Overruling *City of Cleveland v. Wick*, 18 O. St. 303.

**Sec. 240. Measure of damages—Condemnation of land for railroad right of way.** The measure of damage for the appropriation of land for a railroad right of way is the value of the land when taken by the railroad company before any injury thereto resulting from the construction of the road, and the injury or diminution in the value thereby caused to the remaining and contiguous lands, with interest on the sum thus ascertained. *Mobile & O. R. Co. v. Hester*, 122 Ala. 249 (25 So. Rep. 220). The measure of damage to land adjacent to land taken for a railroad right of way is the depreciation in its market value by reason of the construction of the road, and in determining such market value, it is proper to consider the effect of the construction of the railroad upon the owner's use and enjoyment of his land for the highest and best use to which it is adapted. *Galesburg & G. E. R. Co. v. Milroy*, 181 Ill. 243 (54 N. E. Rep. 939). Under Tex. Rev. Stat. § 4459 the damages is limited to "the value of the property sought to be condemned and to damages which will be sustained by the owner thereof by reason of such condemnation," and he cannot recover in such proceedings damages resulting from a tort of the railroad company in failing to build cattle guards and fence its right of way. *Gregory v. Gulf & I. Ry. Co.*, 21 Tex. Civ. App. 598 (54 S. W. Rep. 617). In determining what a fair compensation shall be to the owner for a right of way for a railroad over his property, the improved condition of the land sought to be utilized is a proper element in reaching conclusions. The owner is not entitled to recover what it would cost the expropriating company to bring other lands in the neighborhood up to a similar condition of improvement, but he is entitled to a reasonable remuneration, in view of its conditions having made it specially adapted and ready for railroad purposes. *Orleans & J. Ry. Co. v. Jefferson & L. P. Ry. Co.*, 51 La. Ann. 1605 (26 So. Rep. 278).

In appropriating land for a railroad right of way it

is proper to consider the increased danger of the destruction of buildings by fire on account of the operation of the railroad, as an element of damage. *Mobile & O. R. Co. v. Hester*, 122 Ala. 249 (25 So. Rep. 220). An increase in the insurance rates on property in the vicinity may be shown, *Indiana, I. & I. R. C. v. Stauber*, 185 Ill. 9 (56 N. E. Rep. 1079); and so may a depreciation in the rental value of property on account of the construction of the railroad, *Rock Island & E. I. Ry. Co. v. Gordon*, 184 Ill. 456 (56 N. E. Rep. 810). Difficulty of access to the different remaining parts of the owner's land and the inconvenience of communicating between them, caused by the construction of the road, are proper elements of damage. *Rock Island & E. I. Ry. Co. v. Gordon*, 184 Ill. 456 (56 N. E. Rep. 810). Where lands of a manufacturing company are taken it cannot recover speculative profits which it might realize by using the lands in the future for enlarging its plant. In such a case the effect of the construction of the road upon the market value of the property on account of its being benefited by an increase in its railroad facilities is to be determined by the facts in the case, and not by the desires of the manufacturing company in respect to having additional railroads. *Hamilton v. Pittsburg, B. & L. E. R. Co.*, 190 Pa. St. 51 (42 Atl. Rep. 369; 51 L. R. A. 319; see pages 320-332 for note collating authorities on "Damages in eminent domain cases as affected by loss of profits").

**Sec. 241. Measure of damages—Condemnation of railroad lands for other public use.** In appropriating a railroad right of way for the purpose of establishing a highway across it, the company is entitled, without regard to benefits, to receive compensation for the value of the land taken and the expense of the necessary structural changes to make the tracks conform to the grade of the street; but it cannot recover the cost of placing and maintaining planks between the rails nor the expense incident to the erection and maintenance of gates at the crossings and the keeping of a flagman there, in compliance with the police regulations of the town. *Morris & E. R. Co. v. City of Orange*, 63 N. J. L. 252 (43 Atl. Rep. 730). See opinion for review of authorities on last proposition. The

damages which a railroad company can recover from a telegraph company in condemnation proceedings by the latter for so much of its right of way as is needed by the latter in which to place its poles is to be measured by the extent to which its use of the land has been impaired, and not by the advantages accruing to the telegraph company. *San Antonio & A. P. Ry. Co. v. Southwestern Telegraph & Telephone Co.*, Tex. Civ. App. (56 S. W. Rep. 201). In such a case the measure of damages is not the value of the land embraced in the right of way between the poles and under the wires, but is the extent to which the value of the use of such spaces by the railroad company is diminished by the use of the same by the telegraph company for its purposes; and in such a case the possibility that the railroad company may change its line and use the land for other purposes is too remote for consideration; nor is it proper to consider the fact that the telegraph poles may prove an obstruction to the building of additional sidetracks and other improvements, where the telegraph company agrees in such a contingency to change the location of its line at its own expense. *Mobile & O. R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731 (26 So. Rep. 370). See opinion for review of authorities on this subject.

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## EQUITY

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### EPITOME OF CASES.

**Sec. 242. Subrogation—General principles and particular cases.** One entitled to remove a lien against his property, and who pays the debt of another in order to relieve his property from such lien, shall become substituted in the place of the holder of the lien, and be vested with all the rights and remedies possessed by such lienholder, *Kinnah v. Kinnah*, 184 Ill. 284 (56 N. E. Rep. 376); but one advancing money to pay a lien note cannot be

subrogated to the lien to the prejudice of a lien held by the creditor to secure other notes, *Gaskill v. Huffaker*, Ky.

(49 S. W. Rep. 770; 20 Ky. Law Rep. 1555). One having an equitable title to funds which are used to discharge a mortgage may have the lien thereof revived and be subrogated to the rights of the original mortgagee, where it is necessary to his protection. *Markillie v. Allen*, 120 Mich. 360 (79 N. W. Rep. 568). An owner of land, who, without knowledge of the existence of a junior lien thereon, pays off a senior lien, will be presumed to make such payment for his own benefit, and for the protection of his own interests equity will treat such owner as the assignee of the original senior lienholder and will revive and enforce such senior lien for his benefit. *Darrough v. Herbert Kraft Co. Bank*, 125 Cal. 272 (57 Pac. Rep. 983). Under Ohio Rev. Stat., § 6074 an administrator has no power to sell or transfer notes secured by mortgage which belonged to the deceased at the time of his death, and such notes taken up by a third party will be regarded and held as paid, as between the administrator and such third party; but, as between such third party and a subsequent mortgagee with notice of the prior mortgage, such third party may be subrogated to the lien of the prior mortgage, when no additional burdens will thereby be imposed upon such subsequent mortgagee, and such third party did not pay the notes to the administrator as a mere volunteer. *Miller v. Stark*, 61 O. St. 413 (56 N. E. Rep. 11). For particular fact cases illustrating the doctrine of subrogation see *Webber v. Hausler*, 77 Minn. 48 (79 N. W. Rep. 580); *Brainard v. Feather*, 123 Mich. 462 (82 N. W. Rep. 212); *National Life Ins. Co. v. Ayres*, 111 Ia. 200 (82 N. W. Rep. 607).

**Sec. 243. Subrogation—One furnishing money to discharge prior lien.** One lending money to another to enable him to discharge a prior lien on his land without any intention of claiming subrogation to such lien, but takes a mortgage as his security, is not entitled to be subrogated to such lien in order to gain priority over a claim of homestead, *Bible v. Wisecarver*, Tenn. (50 S. W. Rep. 670); nor can a lender of money who takes as his security for a loan a mortgage which he believes under a mistake



of law to be valid, but which in fact is invalid, claim the right to be subrogated to a prior mortgage which he and his mortgagor caused to be paid out of the funds loaned and had the same cancelled, *Brown v. Rouse*, 125 Cal. 645 (58 Pac. Rep. 267). If a person is induced to advance the money to pay off a trust lien on real estate on the assurance that the title to such property is otherwise clear, and take a new trust to secure the money so advanced, and it afterwards turns out the title to such real estate is incumbered by title bond, judgment lien, or otherwise, a court of equity will keep the original trust alive as a security for the money so advanced. *Southern Bldg. & L. Ass'n v. Page*, 46 W. Va. 302 (33 S. E. Rep. 336).

**Sec. 244. Subrogation—Discharging vendor's lien or paying purchase money obligations.** One, who under a contract for the purchase of a portion of a tract of land, as the consideration therefor, discharges an outstanding obligation for a part of the purchase price for the whole tract, is entitled to be subrogated to the vendor's lien incident to such obligation, although the party with whom he contracts is an intermediate party between him and the grantor and has no title on account of claiming under a void agreement. *Nalle v. Farrish*, 98 Va. 130 (34 S. E. Rep. 985).

Where a vendor retains title to the land until full payment of the purchase price of the land is made by the vendee, he has no vendor's lien to which a third party furnishing money to the vendee to pay the purchase price under an agreement that the latter will give him a mortgage as security after receiving the legal title, which he refuses to do, can claim the right of subrogation. *Campan v. Molle*, 124 Cal. 415 (57 Pac. Rep. 208).

**Sec. 245. Subrogation—Rights of sureties.** A surety paying off a judgment against him and his principal for the debt is entitled to be subrogated to the judgment and claim the benefit of the lien thereof. *Woods v. Douglas*, 46 W. Va. 657 (33 S. E. Rep. 771). Sureties or indorsers paying a note secured by a deed of trust cannot claim subrogation thereto where the holder of such deed, had previously released it. *George v. Somerville*, 153 Mo. 7 (54 S.

W. Rep. 491). A surety on an injunction bond given to restrain the enforcement of a judgment based on vendor's lien notes, or one to whom he has conveyed all his property and who has assumed the payment of his debts, who, upon dismissal of the injunction, pays the judgment, is entitled to be subrogated to the vendor's lien. *Darrow v. Summerhill*, 93 Tex. 92 (53 S. W. Rep. 680; 77 Am. St. Rep. 833).

**Sec. 246. Subrogation—Executor or devisee paying debts of decedent's estate.** An executor who pays a debt of his testator with his own funds will be subrogated to the rights of the creditor; the same is true of a devisee of a life estate in lands who pays with his own funds a debt of the testator, which debt either is charged upon the land by the will or is payable out of it by statute. *Suydam v. Voorhees*, 58 N. J. Eq. 157 (43 Atl. Rep. 4). The court say: "It is entirely settled that one who volunteers to pay another's debt has no claim to subrogation; but if he has an interest which is menaced by the existence of the debt, he is relieved of the character of a volunteer. Nor does the quantity of the interest, which is likely to be destroyed or impaired by the existence of the debt, matter. If he has any palpable interest, which will be protected by the extinguishment of the debt, he can pay the debt, and be entitled, in equity, to hold and enforce it, just as could the original creditor. A tenant for years who pays a mortgage upon the leased premises will be subrogated. *Hamilton v. Dobbs*, 19 N. J. Eq. 227. A widow who discharges a lien on the estate of which she is dowable will be subrogated to the right of the lienor. *Woods v. Wallace*, 30 N. H. 384. A devisee,—*Redmond v. Burroughs*, 63 N. C. 242,—or an heir,—*Chaplin v. Sullivan*, 128 Ind. 50 (27 N. E. Rep. 425)—who pays a debt, to protect his interest, will be subrogated. A discharge by certain legatees of a judgment against the estate will entitle them to substitution to the position of the judgment creditor. *Mitchell v. Mitchell*, 8 Humph. 359. Instances in illustration of the general rule above stated might be extended indefinitely."

**Sec. 247. Subrogation—Grantees to mortgagees.** A grantee of mortgaged land assuming the payment of the

mortgage as a part of the consideration therefor who afterwards pays the mortgage debt, is entitled to be subrogated to the lien of the mortgage, he having acted in good faith, where the deed to him is declared void and his grantor reclaims the land. *Faulk v. Calloway*, 123 Ala. 325 (26 So. Rep. 504), collating and citing numerous authorities. A judgment creditor who purchases for a nominal sum mortgaged real estate at an execution sale under his judgment, subject to the mortgage, acquires the equity of redemption only and cannot be subrogated to the rights of the mortgagee if the amount of the mortgage debt should be collected from other property of the mortgagor. *Myers v. Jones*, 61 Kan. 191 (59 Pac. Rep. 275).

**Sec. 248. Equitable conversion—Personalty treated as realty and realty treated as personalty.** Insurance money realized from the destruction of buildings on devised real estate will be treated as realty. *Horton v. Upham*, 72 Conn. 29 (43 Atl. Rep. 492). A contract for the sale of real estate presently operative works an equitable conversion of the land into personalty from the time it is made, and the purchase money becomes a part of the vendor's personal estate and is distributable as such upon his death. *Gilmore v. Gilmore*, 60 Kan. 606 (57 Pac. Rep. 505). Under Mass. Pub. Stat., ch. 142, § 9, the unexpended balance of proceeds of the sale of a decedent's real estate to pay debts will be treated as real estate. *Adams v. Jones*, 176 Mass. 185 (57 N. E. Rep. 362). Where an agreement by the holders of overdue mortgages, the declared purpose of which is promptly to realize on them, appoints certain persons as their trustees, making them assignees of their interests and empowering them to foreclose the mortgages and sell at a price satisfactory to themselves or to purchase and resell within a specified time, land purchased by such trustees in pursuance of such agreement will be treated as personalty. *Sweeney v. Horn*, 190 Pa. St. 237 (42 Atl. Rep. 709).

**Sec. 249. Equitable conversion—Directions to executor to sell real estate.** A direction in a will to sell land and distribute the proceeds amounts to an equitable conversion. *Van Zandt v. Garretson*, 21 R. I. 352 (43 Atl. Rep.

633); *Robison v. Botkin*, 181 Ill. 182 (54 N. E. Rep. 915); *English v. Cooper*, 183 Ill. 203 (55 N. E. Rep. 687); *Duff's Ex'r v. Duff*, Ky. (54 S. W. Rep. 711; 21 Ky. Law Rep. 1211); *C. H. Brown Banking Co. v. Stockton*, Ky. (54 S. W. Rep. 854; 21 Ky. Law Rep. 1212). And the beneficiaries under such a will, by entering into a contract for the sale of the land, as an election on their part to reject the will, do not effect a reconversion of the estate into realty and become vested with the legal title thereto. *Van Zandt v. Garretson*, 21 R. I. 418 (44 Atl. Rep. 221). Mere authority vested in executors to sell real estate on the request of another does not work a conversion; but in order for the direction to sell to have that effect it must be absolute and unconditional. *Meade v. Campbell*, Va. (34 S. E. Rep. 30). Where the language and general scheme of a will devising real estate raises an implied and imperative power of sale in order to carry out its provisions, there is an equitable conversion of real estate into personalty. *Salisbury v. Slade*, 160 N. Y. 278 (54 N. E. Rep. 741). The general rule that a positive direction to reduce real estate to money for all the purposes of a will will accomplish an equitable conversion of the estate from the time of the taking effect of the will, does not apply where a will directs a conversion of realty into personalty for a particular but void purpose; and, unless otherwise clearly indicated by the will, such realty will pass to the heirs as property undisposed of thereby. But if, notwithstanding the failure of a purpose requiring a conversion of realty into personalty to satisfy it, the intention is manifest to accomplish a distribution of the estate in the form of money, that intent will accomplish the conversion of the realty into personalty in equity; and, unless otherwise clearly indicated, a void bequest will fall into the residuum and go to the residuary legatee if there be such. *Harrington v. Pier*, 105 Wis. 485 (82 N. W. Rep. 345; 50 L. R. A. 307; 76 Am. St. Rep. 924). Where real estate is not devised to an executor, but he is directed to convert it into money as fast as sales profitably can be effected, such a direction constitutes, in favor of any whose interests under the will otherwise cannot be secured, an equitable conversion of the real estate into personalty. *Duffield v. Pike*, 71 Conn. 521 (42 Atl. Rep. 641). An equitable conversion of real estate into money is effected by a devise of it to be invested in a fund for the support and maintenance of a

valid charity. *Harrington v. Pier*, 105 Wis. 485 (82 N. W. Rep. 345; 50 L. R. A. 307; 76 Am. St. Rep. 924); *Hood v. Dorer*, 107 Wis. 149 (82 N. W. Rep. 546).

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## ESTATES

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### EPITOME OF CASES.

**Sec. 250. Estate in land—Ownership by different persons of upper and lower stories of building.** The right to construct, operate and forever to repair, renew and maintain a main trunk sewer under and through land is an estate in the land. *State v. Mayor of City of Bayonne*, 63 N. J. L. 532 (42 Atl. Rep. 833). Where a lot and the lower stories of a building are owned by one person and the upper stories by another, they are not tenants in common, nor joint tenants, but merely adjoining tenants. *Badger Lumber Co. v. Stepp*, 157 Mo. 366 (57 S. W. Rep. 1059). Citing *McCormick v. Bishop*, 28 Ia. 239; *Rhodes v. McCormack*, 4 Ia. 368 (68 Am. Dec. 663); *Thorn v. Wilson*, 110 Ind. 325 (11 N. E. Rep. 230; 59 Am. Rep. 209); *Cheesborough v. Green*, 10 Conn. 318 (26 Am. Dec. 396); *Hahn v. Lodge*, 21 Or. 30 (27 Pac. Rep. 166; 13 L. R. A. 158; 28 Am. St. Rep. 723); 1 Washb. Real Prop. 18; *Shirley v. Crabb*, 138 Ind. 200 (37 N. E. Rep. 130; 46 Am. St. Rep. 376); *Newhoff v. Mayo*, 48 N. J. Eq. 624 (23 Atl. Rep. 265; 27 Am. St. Rep. 455).

**Sec. 251. Creation of fee simple estate.** A conveyance to A. J., "and his children after him," with habendum to A. J. "and his heirs forever," is a conveyance to A. J. in fee simple; the granting clause and the habendum not being irreconcilably repugnant. *Martin v. Jones*, 62 O. St. 519 (57 N. E. Rep. 238). A conveyance in trust for the sole use and benefit of the beneficiary for and during the term of her natural life and after her death to be conveyed by the trustee to her surviving children, which gives the beneficiary absolute power of disposal through the trustee, vests in her an equitable fee. *Davis v. Heppert*,

96 Va. 775 (32 S. E. Rep. 467). A deed to a husband conveying land to him for the use and benefit of his wife, with full power and authority to her, during her natural life, to use and occupy the premises or to sell and dispose of them with or without his consent as if she were unmarried, and which provides that if she should die before her husband the property undisposed-of by her should pass to him, passes to her the whole estate upon her surviving him. *Rodgers v. Cobb*, 89 Md. 165 (42 Atl. Rep. 935). Upon the death of a wife to whom her husband has conveyed land "during her natural life, and at her death to revert back to my heirs," the remainder reverts to the grantor if living, and if not, to his then heirs; and where the reversion is to the grantor he takes a fee which he may dispose of by devise. *Akers v. Clark*, 184 Ill. 136 (56 N. E. Rep. 296; 75 Am. St. Rep. 152). For particular conveyances held to create an estate in fee simple, see *Chenault v. Chenault*, Ky. (56 S. W. Rep. 728).

A devise to a testator's widow of "all the rest and residue of my estate and property, real and personal, and of every nature and kind, and wheresoever situate and being," will pass to her a fee simple estate in all his lands not otherwise disposed of. *Carter v. Gray*, 58 N. J. Eq. 411 (43 Atl. Rep. 711). In Pennsylvania it is held that a devise to one "for her use and profit during her natural life" and if she leave no heir, the property is to be sold and the proceeds divided among others, 'gives to the first devisee a fee simple, the word "heirs" being a word of limitation. *Reimer v. Reimer*, 192 Pa. St. 571 (44 Atl. Rep. 316; 73 Am. St. Rep. 833). A devise by a testator to his wife of all his property "to use, enjoy and manage as she in her judgment sees fit," gives her a fee. In *re Barrett's Will*, 111 Ia. 570 (82 N. W. Rep. 998). A devise of all his property by a testator to his widow "to use and dispose of as she may desire, with full power to sell and convey the same, or do with the same as she may desire," invests her with a fee simple title to the property, although a subsequent clause in the will directs as to the distribution of the property she may own at her death. *Cameron v. Parish*, 155 Ind. 329 (57 N. E. Rep. 547). A devise by a testator to his wife, C. S., of "all my estate, both real and personal, of all kind and description whatsoever, as her

sole property forever, and known and described as my homestead farm, where I now reside," passes to her the absolute fee simple of the homestead farm, regardless of a subsequent provision that "my desire is that my daughter, M. S., have all the estate, not disposed of in the above bequeath at the death of my wife, C. S." *Seager v. Bode*, 181 Ill. 514 (55 N. E. Rep. 129). One to whom land is devised in trust for her benefit for and during her life, then to such of her children as she may leave surviving, takes a fee simple title to the land, which is determinable by her having or leaving children at her death, and which becomes absolute at her death without having had and without leaving any child or children. *Harrison v. Weatherly*, 180 Ill. 418 (54 N. E. Rep. 237), citing numerous authorities. A devise of "the use to my oldest son C. during his life, and to his heirs to the third generation the same use, then the property to be sold and divided equal among the heirs of C., the farm," gives a fee to C. and his heirs, the restriction to the third generation being merely an attempted restraint on alienation for that period. *Stigers v. Dinsmore*, 193 Pa. St. 482 (44 Atl. Rep. 550; 74 Am. St. Rep. 702). For particular devises held to create a fee simple estate, see *Serfass v. Serfass*, 190 Pa. St. 484 (42 Atl. Rep. 888); *Myers v. Warren C. Library & R. R. Ass'n*, 186 Ill. 214 (57 N. E. Rep. 869); *Wooten v. Reed*, Tenn. (53 S. W. Rep. 991; *Boston Safe-Dep. & T. Co. v. Stich*, 61 Kan. 474 (59 Pac. Rep. 1082).

**Sec. 252. Limitations upon fee simple estate, void.**

Where a first taker is given an estate in fee or for life, coupled with an unlimited power of disposition, the fee or absolute estate vests in the first taker, and any limitation over is void. *Brien v. Robinson*, 102 Tenn. 157 (52 S. W. Rep. 802); *Stewart v. Stewart*, 186 Ill. 60 (57 N. E. Rep. 885); *Clay v. Chenault*, Ky. (55 S. W. Rep. 729; 21 Ky. Law Rep. 1485), reviewing numerous authorities. See also § 915 in this volume. The rule applies to the conveyance of a fee in trust for a married woman, and will be enforced, notwithstanding the trustee covenants, in addition to the performance of the trust during the lifetime of the cestui que trust, to convey on her death to her husband in default of other appointment by her.

Sherwood, Brace and Marshall, JJ., dissenting. *Cornwell v. Wulff*, 148 Mo. 542 (50 S. W. Rep. 439; 45 L. R. A. 53). The court say: "The question presented here, and argued now for the first time, is this; Can there be a valid conditional limitation or executory devise where the executory limitation is conjoined with an absolute power in the first taker or primary devisee to defeat and cut off the further estate or interest by alienation of the entire fee in his lifetime and whether it makes any difference as to the rights of the ulterior grantee or devisee whether this power to alien has or has not been exercised? Whatever preconceived notions we may have, I take it this question, being one so seriously affecting property rights, should be determined by the adjudicated law, and we should not be swerved from the law because some grantor, devisor, or conveyancer has attempted to do what the settled rules of law will not permit. *Hogan's Heirs v. Walcker*, 14 Mo. 177; *Brown v. Rogers*, 125 Mo. 398 (28 S. W. Rep. 630). Appealing, then, to the decided law and recognized authority, we find Chancellor Kent, in his Commentaries (4 Kent, Comm. [12th Ed.] 270), declaring: 'If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A. in fee, and if he dies possessed of the property without lawful issue the remainder over, or remainder over the property which he, dying without heirs, should leave, or without selling or devising the same, in all such cases the remainder over is void as a remainder, because of the preceding fee; and it is void by way of executory devise because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied from the will.' 'A valid executory devise cannot subsist under an absolute power of disposition in the first taker.'

It was urged in argument that this doctrine rested upon the great name of Kent. If so, it has no ignoble origin; but, as we shall presently see, this is not true, though his recognition of the rule, has, no doubt, greatly added to its stability. We have the testimony of the court of appeals of New York, in *Van Horne v. Campbell*, 100 N. Y. 287 (3 N. E. Rep. 316, 771; (53 Am. Rep. 166), to the effect that, beginning with *Jackson v. Bull*, 10 Johns. 19, and down to *Van Horne v. Campbell*, 100 N. Y. 287



(3 N. E. Rep. 316, 771; 53 Am. Rep. 166), there is an unbroken line of authorities in that state reasserting, following and adopting the rule as announced by Chancellor Kent. It has been assailed in New York, as in this case; but the court of appeals held that the question must be considered as closed in New York. It has received the unqualified indorsement of Chief Justice Savage and Justices Cowen and Denio, and of all save one member of the court, in *Van Horne v. Campbell*, 100 N. Y. 287 (3 N. E. Rep. 316, 771; 53 Am. Rep. 166). In Massachusetts, in *Ide v. Ide*, (1809) 5 Mass. 500, the same doctrine was announced by Chief Justice Parsons, several years before *Jackson v. Bull*, 10 Johns. 19, was decided; and it has been reaffirmed in *Gifford v. Choate*, 100 Mass. 343; *Kelly v. Meins*, 135 Mass. 231; *Joslin v. Rhoades*, 150 Mass. 301 (23 N. E. Rep. 42); *Kent v. Morrison*, 153 Mass. 137 (26 N. E. Rep. 427; 25 Am. St. Rep. 616; 10 L. R. A. 756); *Foster v. Smith*, 156 Mass. 379 (31 N. E. Rep. 291). In *Fisher v. Wister*, 154 Pa. St. 65 (25 Atl. Rep. 1009), *Jackson v. Bull*, 10 Johns. 19, came under review, and all learning on the subject was re-examined, and the doctrine approved. The validity of the rule announced by Kent has been repeatedly recognized and followed in Illinois. *Fairman v. Beal*, 14 Ill. 244; *Welsch v. Bank*, 94 Ill. 203; *Wolfer v. Hemmer*, 144 Ill. 554 (33 N. E. Rep. 751). Kentucky, in an able opinion by Chief Justice Harges, in *Ball v. Hancock's Adm'r*, 82 Ky. 108, a case strikingly like the one at bar, approves Kent's statement of the law and *Jackson v. Robins*, 16 Johns. 588. The court of appeals of Maryland, in *Combs v. Combs*, 67 Md. 11 (8 Atl. Rep. 757; 1 Am. St. Rep. 359), citing Chief Justice Parsons in *Ide v. Ide*, 5 Mass. 500, and quoting Chancellor Kent's declaration, that 'we are obliged to say that an absolute ownership or capacity to sell in the first taker, and a vested right by way of executory devise in another, which cannot be affected by such alienation, are perfectly incompatible estates, and repugnant to each other, and the latter is to be rejected as void,' said: 'Both of these great jurists cited and relied upon *Attorney General v. Hall*, Fitzg. 314, decided by Lord Chancellor King, assisted by the master of the rolls and Chief Baron Reynolds, and quoted with approval by Lord Hardwicke in *Flanders v. Clarke*, 1 Ves. Sr. 9. These, assuredly, are authorities of great weight. We think they ought to be considered as settling the law.'

In *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21, the chancellor relied upon 4 Kent Comm. 270, and *Ide v. Ide*, 5 Mass. 500, to the effect that a valid executory devise could not subsist with an absolute power of disposition in the first taker. In *Howard v. Carusi*, 109 U. S. 725 (3 Sup. Ct. Rep. 575), the supreme court of the United States unanimously cite and follow *Jackson v. Bull*, 10 Johns. 19, and *Ide v. Ide*, 5 Mass. 500, and adopt Chancellor Kent's text (4 Kent, Comm. 271). In *Alabama*, *Flinn v. Davis*, 18 Ala. 132, and *McRee's Adm'rs v. Means*, 34 Ala. 349, assert that the law is too well settled to be controverted that an absolute power of disposition in the first taker defeats a limitation over. And it will be found in *Maine*—*Ransdell v. Ransdell*, 21 Me. 288,—and in *Virginia*—*Melsson v. Cooper*, 4 Leigh, 408; *Riddick v. Cohoon*, 4 Rand. 547,—and in *Georgia*—*Cook v. Walker*, 15 Ga. 459,—and in *Indiana*—*Tower v. Hartford*, 115 Ind. 186 (17 N. E. Rep. 281). In a word, it may be asserted that, as late as 1893, there could be found but two American cases, outside of *Missouri*, which disputed the authority of *Ide v. Ide*, 5 Mass. 500, and *Jackson v. Bull*, 10 Johns. 19; and these were *Hubbard v. Rawson*, (1855) 4 Gray, 247, and *Andrews v. Roys*, (1850) 12 Rich. Law, 536; and neither of these cases has been followed in their respective states."

**Sec. 253. Estates tail.** A devise to "Y. and such heirs of her body or children such as she shall leave living at the time of her death," creates an estate tail. *Boyd v. Weber*, 193 Pa. St. 651 (44 Atl. Rep. 1078). In construing a will an estate tail may be held to be created by implication; but the rule is otherwise in a deed. *Hall v. Cressey*, 92 Me. 514 (43 Atl. Rep. 118). The first proposition is supported by *Horton v. Upham*, 72 Conn. 29 (43 Atl. Rep. 492). In *Pennsylvania* an estate in fee tail is converted into a fee simple. *Shoup v. De Long*, 190 Pa. St. 331 (42 Atl. Rep. 680). A conveyance to A. "and her bodily heirs," under the rule at common law creates an estate in fee tail, which, under *Sand. & H. Ark. Dig.*, § 700, is converted into a life estate in the first taker with remainder in fee in the heirs of her body. *Wilmans v. Robinson*, 67 Ark. 517 (55 S. W. Rep. 950). For particular conveyance held such as would have created an estate tail at common law, which, by the statute of *Kentucky*, is converted into

a fee simple estate, see *Jones v. Mason*, Ky. (53 S. W. Rep. 5; 21 Ky. Law Rep. 842). 1 *Swan & C. Ohio Stat.*, p. 550 construed and applied—sale or lease of estates tail. *Ream v. Wolls*, 61 O. St. 131 (55 N. E. Rep. 176).

**Sec. 254. Rule in Shelley's case.** The rule prevails in Pennsylvania. *Reutter v. McCall*, 192 Pa. St. 77 (43 Atl. Rep. 398). A deed naming L., "and his heirs after him," as "party of the second part," the granting clause of which is "to the party of the second part, his heirs and assigns," creates a fee-simple estate in L. *Lane v. Lane*, Ky. (50 S. W. Rep. 857; 21 Ky. Law Rep. 9). The rule is held not to apply to a deed from a father to his married daughter and her bodily heirs, which recites that it is made in consideration of his love and affection for her and her children named therein, and stipulates that the "land and property hereby conveyed is not to be traded or sold, but the produce of the same are to go to support of the said Ava Anna Simonton and her family during her natural life, and, at her death, to be equally and impartially divided between her bodily heirs;" but such a deed vests the life estate in the grantee with remainder in fee to her children. *Simonton v. White*, 93 Tex. 50 (53 S. W. Rep. 339; 77 Am. St. Rep. 824). For particular deed to which the rule was held not to apply, see *King. Stokes*, 125 N. C. 514 (34 S. E. Rep. 641). Ala. Code 1896, § 1025 construed and applied—statute abolishing rule in Shelley's case. *Wilson v. Alston*, 122 Ala. 630 (25 So. Rep. 225).

**Sec. 255. Creation of life estate.** A life estate may be created by a reservation in a deed. *McDougal v. Musgrave*, 46 W. Va. 509 (33 S. E. Rep. 281). A deed to one during his natural life, who is to deed or will the lands to the bodily heirs of another, the former having the discretion of allotting the lands as he may see proper, confers a life estate on the first taker, with vested remainder to the heirs of the other person mentioned, which will open to let in after-born children; and the interests of children dying before the life tenant will pass to their heirs. *Fort Jefferson Imp. Co. v. Dupoyster*, Ky. (51 S. W. Rep. 810; 48 L. R. A. 537; 21 Ky. Law Rep. 515). A

devise of the right to occupy property, where there is no gift over in case the devisee ceases to occupy, creates a life estate, and he may occupy the premises by a tenant. *Reeve v. Troth*, N. J. Eq. (42 Atl. Rep. 571). A devise by a testator to his wife of "all of my property, both real and personal, to have and to use for her benefit, without administrator or executor; she to pay all my just debts and funeral expenses, and to hold the balance during her natural life," gives her a life estate in all the property after the payment of the just debts and funeral expenses, and she is not limited to the use of the income of the estate for this purpose. *Robinson v. Talbot*, Ky. (56 S. W. Rep. 717). A will providing: "I will and bequeath all my real and personal property to my beloved wife, M. B., to have and possess so long as she remains my widow; should she remarry, then the law is my will," gives the widow a life estate, where she never marries. In *re Brooks' Will*, 125 N. C. 136 (34 S. E. Rep. 265). Particular devise held to create a life estate subject to termination by a sale of the premises. *Faxon v. Faxon*, 174 Mass. 509 (55 N. E. Rep. 316). For particular devises held to create a life estate, see *In re Nevin's Estate*, 192 Pa. St. 258 (43 Atl. Rep. 996); *Miller v. Lamprey*, 68 N. H. 376 (44 Atl. Rep. 528); *Derse v. Derse*, 103 Wis. 113 (79 N. W. Rep. 44); *Mims v. Hair*, 56 S. C. 4 (33 S. E. Rep. 729); *Cross v. Hock*, 149 Mo. 325 (50 S. W. Rep. 786); *Talbott v. Schneider*, Mo. (52 S. W. Rep. 203); *Jeffries v. Butler*, Ky. (56 S. W. Rep. 979).

**Sec. 256. Conveyance or incumbrance by life tenant.**

Where a deed conveying a life estate to a married woman expressly prohibits alienation and creates a trust for the support of herself and children, which is inconsistent with the power to sell the property, she cannot alienate her life estate. *Simonton v. White*, 93 Tex. 50 (53 S. W. Rep. 339; 77 Am. St. Rep. 824). The deed of a life tenant, whose seizin is barred by the statute of limitations, is inoperative and conveys no title. *Adkins v. Spurlock*, 46 W. Va. 139 (33 S. W. Rep. 121). Where the owner of a life estate and an undivided one-seventh interest in fee conveys to another an interest in the property described as "the life interest and estate" of the grantor, such language will not be sufficient to

pass to the grantee the undivided one-seventh interest in fee, when, construing the deed as a whole, it is manifest that the grantor intended to convey the life estate only. *McDonald v. Taylor*, 107 Ga. 43 (32 S. E. Rep. 879). Ala. Code, §§ 1034, 1038 construed and applied—conveyance by life tenant of greater interest than he possesses—forfeiture—validity of his warranties of title. *Edwards v. Bender*, 121 Ala. 77 (25 So. Rep. 1010). Shannon's Tenn. Code, § 4184, providing for the apportionment of rent accruing under a lease made by a tenant for life, where he dies before the expiration of the lease and before the time fixed for the payment of rent and for the recovery pro rata of rent up to the time of his death by his executor or administrator, does not give the life tenant power to create a lease upon the land which would extend beyond the duration of his estate. *Collins v. Crownover*, Tenn. (57 S. W. Rep. 357). A power given to a life tenant to sell the property to support herself and family does not authorize a conveyance by her to pay a debt incurred by one of her children in speculation. *Fleming v. Mills*, 182 Ill. 464 (55 N. E. Rep. 373). A widow, to whom real estate is devised for her own use and benefit during her natural life, with remainder of whatever may remain, may execute a binding mortgage on the premises for moneys used in making improvements thereon by means of which she secured her support from the property. *In re Jenks*, 21 R. I. 390 (43 Atl. Rep. 871). Citing *Swarthout v. Ranier*, 143 N. Y. 499 (38 N. E. Rep. 726).

**Sec. 257. Rights and liabilities of life tenant and remainder man—Sale of property by court of equity.** A life tenant and a remainderman are not tenants in common. *Chamberlin v. Gleason*, 163 N. Y. 214 (57 N. E. Rep. 487). Expenses incident to the administration and management of a testamentary trust properly may be charged to the party entitled to the immediate enjoyment of the equitable estate during his life. *Appeal of Wordin*, 71 Conn. 531 (42 Atl. Rep. 659; 71 Am. St. Rep. 219). Rents are not apportionable between the administrator of a tenant for life and the remaindermen, where there is no privity, and the estate of the latter becomes an estate in possession immediately upon the death of the life tenant, and puts an end to the lease made by him. *Noble v. Tyler*, 61 O. St. 432 (56 N. E. Rep. 191; 48

L. R. A. 735). A tenant for life is not liable for the accidental destruction of the property; nor is she bound to restore the property in such a case, although she acquired her estate under a devise stipulating that she is "to keep the same in repair." *Sampson v. Grogan*, 21 R. I. 174 (42 Atl. Rep. 712; 44 L. R. A. 711). See opinion for exhaustive discussion of the common law and English statutes on waste by life tenant. In applying the rule that a life tenant may work mines opened by the former owner of the fee, it is held that mines authorized to be opened under a lease duly executed by such owner will be treated as opened at the time of his death, although no mine actually was opened until after such time. *Alderson's Adm'r v. Alderson*, 46 W. Va. 242 (33 S. E. Rep. 228). An assessment for paving a street properly may be charged against a life tenant, where the pavement is not shown to be especially durable and the tables of mortality indicate that the life estate may outlast the pavement. *Appeal of Wordin*, 71 Conn. 531 (42 Atl. Rep. 659; 71 Am. St. Rep. 219). The general rule is that municipal assessments for permanent improvements are apportionable between the life tenant and the remaindermen according to the circumstances of the case and their respective interests in the property. It is proper to require the life tenant to pay the interest on the assessment during her life, and the remaindermen to pay the principal of the assessment as it falls due. A stipulation in a devise by a testator to his wife for life that she "shall pay the taxes assessed against said house and lot during her lifetime," does not require her to pay municipal assessments for permanent improvements, as they are not included in the word "taxes" as used in the will. *Chamberlin v. Gleason*, 163 N. Y. 214 (57 N. E. Rep. 487).

A court of equity, upon a bill by a life tenant and a remainderman showing that unless it interferes the property will be lost to both of them, may appoint a trustee to take the fee in the property, sell the same, and re-invest the proceeds for their benefit. *Baldrige v. Coffey*, 184 Ill. 73 (56 N. E. Rep. 411). To the same effect are the cases of *Ex parte Yancey*, 124 N. C. 151 (32 S. E. Rep. 491; 70 Am. St. Rep. 577); *Ruggles v. Tyson*, 104 Wis. 500 (79 N. W. Rep. 766; 48 L. R. A. 809); *Ruggles v. Tyson*, 104 Wis. 500 (81 N. W. Rep. 367; 48 L. R. A. 809), in which it is also held that all the persons in being who have any interest in the property being made parties, after-born children will be concluded by

the decree. See last case cited for exhaustive discussion of the whole subject.

**Sec. 258. Estates in joint tenancy.** A conveyance of land to five trustees "as joint tenants, and not as tenants in common," creates a joint tenancy with right of survivorship upon the death of one of their number, notwithstanding the fact that at the time of its execution they entered into articles of association providing for the election of a new trustee by the survivors in case of the death of one of them. *Norris v. Hall*, Mich. (82 N. W. Rep. 832). In Virginia it is held that a devise "unto my two sons, C. and H., of all the land I now reside on," makes them joint tenants; and that the statute abolishing the right of survivorship in case of joint tenants, does not affect the common law rule that where a devise is to several jointly, and one of them dies in the testator's lifetime, his share does not lapse, but the others are entitled to the entire property. *Lockhart v. Vandyke*, 97 Va. 356 (33 S. E. Rep. 613). Kan. Laws 1891, ch. 203, abrogating the rule of survivorship in joint tenancy, excepts trust estates from its operation. *Boyer v. Sims*, 61 Kan. 593 (60 Pac. Rep. 309).

**Sec. 259. Conveyance of expectant estates.** In New Hampshire it is held that a prospective heir cannot release his expectant interest in another's estate. *Cass. v. Brown*, 68 N. H. 85 (44 Atl. Rep. 86). While a deed by a contingent remainderman of his expectancy is inoperative as a conveyance, when made at the time he had no estate in the land, it is enforceable in equity as an executory agreement, where, by the death of the life tenant, he acquires an interest; and a mortgage given by the grantee in such a deed may be enforced as an assignment of his right under the deed, viewed as an executory contract, although the mortgager died before his grantor acquired any interest in the lands. *Mudge v. Hammill*, 21 R. I. 283 (43 Atl. Rep. 544; 79 Am. St. Rep. 802); *Mudge v. Hammill*, 21 R. I. 463 (44 Atl. Rep. 595).

**Sec. 260. Remainders—General principles—Contingent and vested.** A devise of a life estate to the testator's mistress, void as to the amount it exceeds a certain proportion of the estate, under S. C. Rev. Stat. 1893, § 1999, is a

sufficient particular estate to support a remainder. *Beaty v. Richardson*, 56 S. C. 173 (34 S. E. Rep. 73; 46 L. R. A. 517). 18 S. C. Stat. at Large, p. 430, providing "that no estate in remainder whether vested or contingent shall be defeated by any deed of feoffment with livery of seizin," is constitutional and applies to conveyances executed after its passage affecting remainders created prior thereto. *People's Loan & Exchange Bank v. Garlington*, 54 S. C. 413 (32 S. E. Rep. 513; 71 Am. St. Rep. 800). A deed from a husband to his wife, which limits the estate to her for life, with remainder to the heirs of the bodies of the husband and wife, creates in such heirs a contingent remainder, and they take as purchasers and not by descent; and an heir who dies before his mother takes no interest in the estate. *Mudge v. Hammill*, 21 R. I. 283 (43 Atl. Rep. 544; 79 Am. St. Rep. 802). A contingent remainder in real estate may be the subject of a mortgage, upon breach of which the mortgagee may sell whatever interest the mortgagor may have in the property, without waiting until the happening of the condition on which the remainder would become vested. *People's Loan & Exchange Bank v. Garlington*, 54 S. C. 413 (32 S. E. Rep. 513; 71 Am. St. Rep. 800). See opinion for particular devise held to create a contingent remainder. Where a remainder is limited to a class, some of whom are in being, the fee vests in those who are in being subject to be opened up to let in those who afterwards may be born during the continuance of the life estate. *Field v. Peeples*, 180 Ill. 376 (54 N. E. Rep. 304). Upon the death of a testator who has devised land to his wife for life with remainder to his children, the title passes directly to his children subject to the life estate. *Hill v. True*, 104 Wis. 294 (80 N. W. Rep. 462). An antenuptial contract providing that if the wife should survive the husband she should have a life estate in certain real estate which, "at her death," should descend to the husband's heirs, gives such heirs a vested remainder on the death of the husband. *Harris v. Russell*, 124 N. C. 547 (32 S. E. Rep. 958). A conveyance by a father to his two sons, Stephen and George, "their heirs and assigns, forever, one-third to Stephen and two-thirds to George," the grantees to come into possession after the decease of the grantor and his wife, which pro-



vides that "if my son Stephen die without children, then Stephen's third part is to go to my son George," creates in Stephen a vested remainder in fee simple, determinable upon the contingency of his death without legitimate children. *Hall v. Cressey*, 92 Me. 514 (43 Atl. Rep. 118). For particular devises held to create vested remainders, see *Waring v. Waring*, 96 Va. 641 (32 S. E. Rep. 150); *Chewning v. Shumate*, 106 Ga. 751 (32 S. E. Rep. 544); *McDonald v. Taylor*, 107 Ga. 43 (32 S. E. Rep. 879); in *re Fair's Estate*, 132 Cal. 523 (50 Pac. Rep. 442).

**Sec. 261. Creation of estates upon condition—Conditions subsequent.** A stipulation in a will otherwise devising a fee that all the timber on a certain tract of land should be worked in accordance with a contract of hiring existing between the testator and a third person and the proceeds to go to the testator's heirs, does not create an estate either upon condition precedent or subsequent, nothing in the will intimating that the vesting or continuance of the estate should be dependent upon the performance or nonperformance of the contract. *Lambden v. West*, 7. Del. Ch. 226 (44 Atl. Rep. 797). A deed by a corporation containing a stipulation that "the said property is conveyed with the condition, first, this conveyance is for strictly educational purposes, and shall be good and valid so long as the grantee shall use the premises for school purposes; and, when not so used, they shall revert to the stockholders, their heirs and assigns," has the effect of creating a reversion in the corporation when the property is not used for the purpose stipulated. *Pettit v. Stuttgart Normal Institute*, 67 Ark. 430 (55 S. W. Rep. 485).

A conveyance of land to a railroad company "made upon the express conditions" that the depot of said company should remain permanently at a designated place; and that certain bridges should be built at designated places and for certain purposes, creates an estate upon conditions subsequent. *Brown v. Chicago & N. W. Ry. Co.*, Ia. (82 N. W. Rep. 1003). The court says: "None of the provisions of this deed, then, can be construed conditions precedent, as each relates to something that must be done subsequent to its delivery. They are either conditions subsequent, or else covenants of the

grantee. The words 'upon the express conditions' will not always be held to create conditions, as the law, because of its abhorrence of a forfeiture, will construe such clauses in a deed to be covenants, rather than conditions, whenever this can be reasonably done. Indeed, the chief distinction between a condition subsequent and a covenant pertains to the remedy in event of a breach, which, in the former, subjects the estate to forfeiture, and in the latter, is merely ground for the recovery of damages. Technical words do not make a condition if otherwise controlled by the context. And whether a clause shall be construed to be a condition subsequent or a covenant must depend upon the contract, the circumstances, and the intention of the party creating the estate. *Peden v. Railway Co.*, 73 Ia. 330 (35 N. W. Rep. 424; 5 Am. St. Rep. 680); *Hartung v. Witte*, 59 Wis. 292 (18 N. W. Rep. 175); *Scovill v. McMahon*, 62 Conn. 378 (26 Atl. Rep. 479; 21 L. R. A. 58; 36 Am. St. Rep. 350); *Elyton Land Co. v. South & North Ala. Ry. Co.*, 100 Ala. 405 (14 So. Rep. 207); *Post v. Weil*, 115 N. Y. 370 (22 N. E. Rep. 145; 5 L. R. A. 422, and note; 12 Am. St. Rep. 809); *Palmer's Ex'r v. Ryan*, 63 Vt. 227 (22 Atl. Rep. 574); *Greene v. O'Connor*, 18 R. I. 56 (25 Atl. Rep. 692; 19 L. R. A. 262, and note); *City of Portland v. Terwilliger*, 16 Or. 465 (19 Pac. Rep. 90). In this deed forfeiture is not expressly mentioned. This is unnecessary where there is no question but that the clause is a condition subsequent. It is a circumstance to be considered, however, in determining whether the clause is a condition or a covenant. In *Close v. Railway Co.*, 64 Ia. 150 (19 N. W. Rep. 886), the fact that the conveyance did not purport to create an obligation on the part of the grantee was held to be of controlling importance. There the deed recited that it was made in consideration of 'the sum of one dollar and the permanent location of a depot on the grounds conveyed,' and this was held to be a condition subsequent. See *Taylor v. Railway Co.*, 25 Ia. 378. In *Blanchard v. Railway Co.*, 31 Mich. 43 (18 Am. Rep. 142), the conveyance was made 'upon the express condition that said railroad shall build, erect, and maintain a depot or station house on the land herein described,' and this clause was construed to be a condition subsequent, rather than a covenant, for the

reason that there was no undertaking on the part of the railroad to build a depot. See, also, *Palmer v. Plank-Road Co.*, 11 N. Y. 389; *Railway Co. v. Hood*, 66 Ind. 580." For exhaustive collection of authorities on "What words create conditions subsequent," see note in 79 Am. St. Rep. 747-768.

**Sec. 262. Conditions subsequent—Conveyance in consideration of support.** A devise of land by a testator to his son containing a provision that "he shall well and faithfully care for and support his mother as long as she shall live," creates an estate upon condition subsequent; but the performance of the condition is personal and may be waived by the mother, so as to vest the fee in the son and pass it to his heirs in case of his death before that of the mother. *Alexander v. Alexander*, 156 Mo. 413 (57 S. W. Rep. 110). A deed made in consideration of the grantee maintaining the grantor may be set aside where there has been a failure to furnish the maintenance. *Goldsmith v. Goldsmith*, 46 W. Va. 426 (33 S. E. Rep. 266); *Lane v. Lane*, Ky. (50 S. W. Rep. 857; 21 Ky. Law Rep. 9). In such a case the grantor's remedy is either to sue at law for the amount of the consideration as it shall become due, or else to treat the deed void, and sue in equity to cancel it. *Salyers v. Smith*, 67 Ark. 526 (55 S. W. Rep. 936). But in Missouri it is held that a petition in equity to cancel a general warranty deed which merely alleges that plaintiffs executed it in consideration of defendant's promise to support them during their lives, and that he has failed to keep his covenant, and is insolvent, without any charge of fraud or undue influence on the part of defendant to obtain the deed, or any allegations showing whether the performance of the promise was a condition precedent or a condition subsequent, is demurrable. *Anderson v. Gaines*, 156 Mo. 664 (57 S. W. Rep. 726). See, on the subject of this section, note in 79 Am. St. Rep. 763-765.

**Sec. 263. Remedy for breach of condition subsequent.** Upon breach of a condition subsequent the remedy is by action at law and not by a bill in equity to enforce a forfeiture of the estate; and this rule is not changed by a

statute (Ia. Code, §§ 4223, 4227) providing for an action to quiet title in the nature of equitable proceedings which may be brought by any one whether in or out of possession of the property. *Brown v. Chicago & N. W. Ry. Co.*, Ia. (82 N. W. Rep. 1003). The court say: "It was settled long ago that, if a condition subsequent is broken, the party entitled to take advantage of the breach may enter, and, if necessary, maintain an action to regain his estate. But equity will not entertain jurisdiction for the purpose of enforcing a forfeiture, though it will sometimes relieve against its consequences. *City of Marshalltown v. Forney*, 61 Ia. 584 (16 N. W. Rep. 740); *Stringer v. Railway Co.*, 59 Ia. 279 (13 N. W. Rep. 308); *Bonniwell v. Madison*, 107 Ia. 85 (77 N. W. Rep. 530); *Railway Co. Neighbors*, 51 Miss. 412; *Watrous v. Allen*, 57 Mich. 362 (24 N. W. Rep. 106; 58 Am. Rep. 363); *Horsburg v. Baker*, 1 Pet. 232 (7 L. Ed. 125); *Smith v. Jewett*, 40 N. H. 530; *Warner v. Bennett*, 31 Conn. 468; *Hershman v. Hershman*, 63 Ind. 457; *Raley v. Umatilla Co.*, 15 Or. 172 (13 Pac. Rep. 890; 3 Am. St. Rep. 151); *Bank v. Smith*, 3 Gill & J. 265; 2 Washb. Real Prop. 21. The authorities relied on by appellant simply recognize the right of a vendor to declare a forfeiture of condition broken, and that he has so done. *Miller v. Hughes*, 95 Ia. 223 (63 N. W. Rep. 680); *Johnson v. Thornton*, 54 Ia. 144 (6 N. W. Rep. 165). Nor is the rule obviated by the chapter of the Code prescribing the practice in actions to quiet title. That removes certain obstacles in the way of maintaining such actions, and simplifies the procedure, but was never intended to authorize relief in chancery, which must otherwise have been sought in a court of law. The relief to be had is still that formerly appropriate in an action to remove clouds, though somewhat enlarged. The changes are tersely summarized by the supreme court of the United States in *Wehrman v. Conklin*, 155 U. S. 344 (15 Sup. Ct. Rep. 129; 39 L. Ed. 167): 'It does not require that the plaintiff should have been annoyed by repeated actions of ejectment. The necessity for the plaintiff to have his title previously established by an action at law is dispensed with. The bill may be filed by a party having an equitable as well as legal title. It is not necessary that plaintiff should be in possession of the land at the time of filing

the bill.' It is still a suit in equity, to be determined as such, and controlled by the principles of equitable jurisprudence. *Standish v. Dow*, 21 Ia. 363; 17 Enc. Pl. & Prac. 278; *Balmear v. Otis*, 4 Dill 558 (Fed. Cas. No. 819)."

In Indiana it is held that a complaint to recover land on account of a breach of a condition subsequent must allege re-entry or its equivalent—that re-entry was prevented, and that possession was demanded and refused. *Preston v. Bosworth*, 153 Ind. 458 (55 N. E. Rep. 224; 74 Am. St. Rep. 313). Where, by his will, the testator gives two properties as one entire devise, subject to the performance of certain named conditions, the devisee can only accept as an entirety, in the manner and upon the terms named in the will that is, he must take both properties, performing all the conditions, or refuse both properties; he cannot accept a part only of the entire devise, and refuse to perform the testator's requirements. Equity will not enforce a forfeiture of a devise for nonperformance of conditions subsequent, but will, if a devisee accepts, compel the performance of the conditions, or, if that be inequitable or impossible, will award compensation in damages for the breach of conditions, if that remedy can be made adequate. *Bird v. Hawkins*, 58 N. J. Eq. 229 (42 Atl. Rep. 588). Particular facts held insufficient to show a forfeiture of lands conveyed to a university on condition that it maintain thereon a botanical garden. *Pierce v. Brown University*, 21 R. I. 392 (43 Atl. Rep. 878).

**Sec. 264. Perpetuities.** It is sufficient that the future estate vest in the taker thereof within the period prescribed by the rule, and it is not necessary that it "vest in possession" within that time. *Gates v. Seibert*, 157 Mo. 254 (57 S. W. Rep. 1065; 80 Am. St. Rep. 625). A statute (Conn. Gen. Stat. 1888, § 2952), providing that the issue and descendants of persons unborn at the death of the testator cannot take under his will, renders void a devise "to those persons who are the natural heirs at law" of a third person at the time of the testator's death. *Tingier v. Chamberlin*, 71 Conn. 466 (42 Atl. Rep. 718). Although, by the terms of a will devising real estate, the persons in whom the fee ultimately will vest are not determinable

until the death of a life tenant, such a devise does not violate the Michigan statute against perpetuities (Comp. Laws, §§ 8796, 8797), where there are persons in being who, by their joinder, could convey an absolute estate in possession. *Torpy v. Betts*, 123 Mich. 239 (81 N. W. Rep. 1094). In construing these sections of the statute it is held that any suspension of the power of alienation not based on lives in being is invalid; and that the power of alienation is not suspended by a provision in a will giving the executor discretion to sell, without restriction as to time; nor is the statute violated by a direction that property be conveyed to a city if it will agree to accept the same for the purpose of maintaining a free public library, where it was possible for alienation to be effected by the executor at any time, either by the city agreeing to accept the property or by its refusing to do so. *Fitzgerald v. City of Big Rapids*, 123 Mich. 282 (82 N. W. Rep. 56). A trust in which the trustees hold subject to the control of the directors of an association creating it does not violate the rule against perpetuities on account of its not necessarily terminating or providing for the sale of the corpus of the property within the period of a life or lives in being at the time of the creation of the trust and twenty-one years, where the shareholders in the association remained the absolute owners of their interests with unlimited power to sell and transfer the same, and which were subject to their debts and the laws governing ordinary property. *Howe v. Morse*, 174 Mass. 491 (55 N. E. Rep. 213). If provisions of a testamentary character are such that under them a violation of the rule against perpetuities possibly may happen, the devise is void. *Eldred v. Meek*, 183 Ill. 26 (55 N. E. Rep. 536; 75 Am. St. Rep. 86). For particular devises held not to violate the rule, see *In re Steele's Estate*, 124 Cal. 533 (57 Pac. Rep. 564); *In re Fair's Estate*, 132 Cal. 523 (60 Pac. Rep. 442). For exhaustive collation of authorities on application of the rule against perpetuities in case of devise to a class, see 73 Am. St. Rep. 427-439.

**Sec. 265. Merger.** A legal estate never merges into an equitable one. *Bassett v. O'Brien*, 149 Mo. 381 (51 S. W. Rep. 107). Whether a merger results from the

possession by the same person at the same time of two estates of different rank in the same property is generally a question of the owner's intention. *Longfellow v. Barnard*, 58 Neb. 612 (79 N. W. Rep. 255; 76 Am. St. Rep. 117); *Oak Creek Val. Bank v. Helmer*, 59 Neb. 176 (80 N. W. Rep. 891); *Hayden v. Brock*, 157 Mo. 88 (57 S. W. Rep. 721). Upon a conveyance by a life tenant of all his interest to the remainderman, the life estate merges into the fee and becomes extinct. *Field v. Peeples*, 180 Ill. 376 (54 N. E. Rep. 304). The purchase of the fee by a widow having a life estate in lands, merges the life estate in the fee so that a sale of the lands on a judgment against her carries the fee. *Kreamer v. Fleming*, 191 Pa. St. 534 (43 Atl. Rep. 388). Where a testatrix's will devising property in trust, the income from which was to be expended in support of her son for life, expressly provided that he was not to control any of the principal, a merger will not be held to take place upon his acquiring the title of one entitled to receive a part of the remainder under the will. *Wehrhane v. Safe-Deposit & Trust Co.*, 89 Md. 179 (42 Atl. Rep. 930).

**Sec. 266. Merger—Conveyance taken by lienholder.**

A mortgagee who cancels his notes, releases his mortgage and, as a part of the same transaction to secure his debt, takes new notes and an absolute deed to the premises, giving bond to reconvey upon payment of the debt, thereby does not merge his interest as mortgagee, where it was to his interest to keep the same alive and there was no intention to release the security held by him as mortgagee. *Farrand v. Long*, 184 Ill. 100 (56 N. E. Rep. 313). The principal creditor is entitled to the benefit of a mortgage given by the principal debtor to his surety for payment of the debt when the mortgage provides for payment of the debt and to save the surety harmless, and the principal debtor has defaulted or become insolvent, and the surety cannot effectively release or discharge the mortgage; nor, if he acquire title to the mortgaged property, will it work a merger or extinguishment of the mortgage. *Oak Creek Valley Bank v. Helmer*, 59 Neb. 176 (80 N. W. Rep. 891).

**Sec. 267. Miscellaneous notes.** When the owner of property dies intestate, without heirs capable of inheriting it, the title thereof, by process of law, devolves upon the state. *Meadowcroft v. Winnebago Co.*, 181 Ill. 504 (54 N. E. Rep. 949). Citing, *Wallahan v. Ingersoll*, 117 Ill 123 (7 N. E. Rep. 519); *Crane v. Reeder*, 21 Mich. 24 *Van Kleeck v. Ohanlon*, 21 N. J. L. 582; *Commonwealth v. Hite*, 6 Leigh, 588 (29 Am. Dec. 226); *People v. Cutting*, 3 Johns. 1. 4 N. Y. Rev. Stat. (8th Ed.), p. 2432, § 13 construed and applied—vesting of future estates. In *re Traver*, 161 N. Y. 54 (55 N. E. Rep. 406).

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## ESTOPPEL

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### EPITOME OF CASES.

**Sec. 268. Estoppel by deed—General principles and particular cases.** A mortgagor is estopped to deny the title he assumed to convey or to defeat the same by setting up a prior outstanding title in another. *Wilson v. Alston*, 122 Ala. 630 (25 So. Rep. 225). A trustee named in a deed of trust is estopped from denying the title or estate of a person for whose benefit it was created, and for whose use he holds it. *Sterling v. Sterling*, 77 Minn. 12 (79 N. W. Rep. 525). A grantor in a quitclaim deed is estopped thereby from claiming any interest in or growing out of the property conveyed which existed at the time of the execution of the deed. *Whyte v. City of St. Louis*, 153 Mo. 80 (54 S. W. Rep. 478). Where a grantee in a deed by an attorney in fact of heirs afterward takes a deed to the property from all of such heirs because of the incapacity of some of them at the time of the first deed, he and his heirs are estopped afterward to question the title vested in accordance with the terms of the last deed. *McCreary v. McCorkle*, Tenn. (54 S. W. Rep. 53). A deed, the grantor's signature to which was obtained by artifice and fraud, without any knowledge on her part that she was



signing a deed, and which never was acknowledged or delivered by her, cannot be the foundation of an estoppel against her, in favor of persons who have advanced money on the faith of the false record thereof, without having seen or acted upon the genuine signature. *Marden v. Dorthy*, 160 N. Y. 39 (54 N. E. Rep. 726; 46 L. R. A. 694). Where land is sold under an execution, or at a foreclosure sale, the defendant in the execution, or the mortgager in the foreclosure proceeding, cannot dispute the plaintiff's or complainant's title thereunder, when such defendant is sued in ejectment by the purchaser under the execution or at the mortgage sale. *Woods v. Sousy*, 184 Ill. 568 (56 N. E. Rep. 1015). Executors, who attempt to transfer the entire estate in land to a third person, who executes a mortgage thereon, and use the proceeds for the benefit of the estate, are, as devisees, estopped from denying that the title passed by the conveyance, or that the mortgage is valid; and in such case the estoppel is binding upon the creditors of such devisees. *Arlington State Bank v. Paulsen*, 59 Neb. 94 (80 N. W. Rep. 263).

**Sec. 269. Title by estoppel—After-acquired title.** A statute (Sand. & H. Ark. Dig., § 699) making an after-acquired title of any "person" having executed a deed purporting to convey a fee, pass to the grantee, does not apply to conveyances by the State. *St. Louis Refrigerator & Wooden Gutter Co. v. Langley*, 66 Ark. 48 (51 S. W. Rep. 68). A title subsequently acquired by a mortgagor who had no interest in the premises at the time of the execution of his mortgage inures to the benefit of his mortgagee, *Hubbard v. Mulligan*, 13 Colo. App. 116 (57 Pac. Rep. 738); *Caple v. Switzer*, 122 Mich. 636 (81 N. W. Rep. 560); and where the description in a mortgage is plain and unambiguous, and according to the recorded plat, subsequently acquired title sufficient to meet the description will inure to the benefit of the mortgagee. *Osborn v. Scottish-American Mortg. Co.*, 22 Wash. 83 (60 Pac. Rep. 49). One joining with a grantor in the execution of a deed in which the latter agrees to dispose of the property as was done in the deed by any subsequent will he may make, is estopped to claim the land under a will from the grantor as against the grantee in the deed. *Moseley v. Stewart*, Tenn. (52 S. W. Rep. 671). Where a purchaser of land at a tax sale conveys it by warranty deed

neither he nor those claiming under him by a subsequent conveyance can assert title on account of the subsequent execution of a tax deed on the land to him based on the mistaken assumption that he had not conveyed. *Tupy v. Kocourek*, 66 Ark. 433 (51 S. W. Rep. 69). The principle that the warranty cannot enlarge the estate conveyed does not prevent an examination of all the terms of the deed in order to ascertain the intention of the parties; and if, from such examination, it appears that it was their intention that the greater estate should pass, and the grantor subsequently acquires such greater estate, he and his privies will be estopped by his deed from setting up such after-acquired title against his grantee, and it will in this way inure to the grantee. *Balch v. Arnold*, Wyo. (59 Pac. Rep. 434).

**Sec. 270. Recitals in deeds and other instruments.**

The fact that a father as guardian of his children includes in an inventory of their estate real estate belonging to himself, does not estop him from asserting title to it. *Koppelman v. Koppelman*, Tex. (57 S. W. Rep. 570). A grantee in a conveyance of land which reserves to the grantor the mineral interests therein, is estopped afterward to assert title to such mineral interests, as against the grantor or his privies, there having been no notice of an adverse holding. *Houser v. Christian*, 108 Ga. 469 (34 S. E. Rep. 126; 75 Am. St. Rep. 72). A party who does not sue upon a deed or other instrument executed by him, and containing admissions made by him, is not estopped in an action against another party to it, in which its admissions are only collaterally drawn in question, to give in evidence the actual fact, though contrary to the admissions. *King v. Mead*, 60 Kan. 539 (57 Pac. Rep. 113). A stipulation in a deed of assignment that it is subject to a certain mortgage does not estop the assignee or the creditors filing claims from disputing the validity of such mortgage. *Ringen Stove Co. v. Bowers*, 109 Ia. 175 (80 N. W. Rep. 318). A provision in a deed of trust that any statement of facts or recitals in a deed made in pursuance of a sale thereunder to the purchaser in relation to the nonpayment of the money secured by the deed of trust shall be received as prima facie evidence of the truth of such fact, does not estop a widow who joined with her husband in the execution of the deed of trust, in a subsequent action by her for dower in the land, from

proving that the debt secured by the deed of trust had been paid at the time of the sale, notwithstanding recitals to the contrary in the deed made in pursuance thereof. *Wells v. Estes*, 154 Mo. 291 (55 S. W. Rep. 255).

**Sec. 271. Estoppel in pais—General principles and particular cases.** Declarations by a grantor that he has sold the land embraced in his void deed do not estop him from reclaiming it. *Faulk v. Calloway*, 123 Ala. 325 (26 So. Rep. 504). One from whom an intending purchaser makes inquiry as to his title to real estate who conceals an unrecorded incumbrance held by him, is estopped from afterward enforcing such incumbrance against such purchaser. *Kelly v. Fairmount Land Co.*, 97 Va. 227 (33 S. E. Rep. 598). A grantor in a deed, invalid on account of insufficiency of description, who locates and places the grantee in actual possession thereof under designated lines and marked corners, is estopped from afterward recovering the land on account of the insufficiency of the description in his deed. *Barker v. Southern Ry. Co.*, 125 N. C. 596 (34 S. E. Rep. 701; 74 Am. St. Rep. 658). A grantee, the delivery of whose deed is in dispute, cannot establish such delivery against his grantor's heirs by an estoppel by proof of statements of the grantor that he had conveyed the land to another, where such statements were not relied upon by the grantee and his condition with reference to the subject matter was not changed on account thereof. *Walls v. Ritter*, 180 Ill. 616 (54 N. E. Rep. 565). Where there is a dispute between a company and an individual as to which of the two owns a tract of land, and the agent of the company has falsely and fraudulently represented to such other claimant that his company has title to the property, and "back deeds" to the same, and, acting upon this, such other claimant purchases from the company an interest in the land, and receives from the company a deed thereto, which interest he, for value, transfers by deed to an innocent purchaser, who likewise acts upon the representations made by said agent, the agent is afterwards estopped from setting up title in his own name against such purchaser. This is true though such agent may afterwards acquire a perfect legal title to the property, not derived from either of the claimants above mentioned. *Crosby v. Meeks*, 108 Ga. 126 (33 S. E. Rep. 913). For a discussion

of the essential elements of an estoppel in pais, see *Farmers' Bank v. Orr*, 25 Ind. App. 71 (55 N. E. Rep. 35).

**Sec. 272. Estoppel by devise accepting benefits of devise.** One accepting the benefits of a devise to him in a will is estopped to assail the title to others originating in the will. *Farmington Sav. Bank v. Curran*, 72 Conn. 342 (44 Atl. Rep. 473). The court say: "It is now a well-settled rule in equity that, if any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will; or, in other words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of every part of the will." *Hyde v. Baldwin*, 17 Pick. 303; *Smith v. Smith*, 14 Gray 532; *Watson v. Watson*, 128 Mass. 154; *Whiting's Appeal*, 67 Conn. 389 (35 Atl. Rep. 268); *Whittemore v. Hamilton*, 51 Conn. 160; *Hall v. Pierson*, 63 Conn. 345 (28 Atl. Rep. 544); *Carter's Appeal*, 59 Conn. 576 (22 Atl. Rep. 320); *Weeks v. Patten*, 18 Me. 42 (36 Am. Dec. 696); *Smith v. Guild*, 34 Me. 447; *Hamblett v. Hamblett*, 6 N. H. 333; *Drake v. Wild*, 70 Vt. 52 (39 Atl. Rep. 248); *Brown v. Ricketts*, 3 Johns. Ch. 553; *Havens v. Sackett*, 15 N. Y. 365; 1 *Woerner*, Adm'n, p. 500; *Pom. Eq. Jur.* § 447; *Schley v. Collis*, 47 Fed. Rep. 250; 2 *Redf. Wills*, p. 351; 2 *Jarm. Wills*, p. 1; *Kirkham v. Smith*, 1 Ves. Sr. 258; *Thellusson v. Woodford*, 13 Ves. 209; *Whistler v. Webster*, 2 Ves. Jr. 367; *Birmingham v. Kirwan*, 2 Schoales & L. 444; *In re Vardon's Trusts*, 28 Ch. Div. 124; *Cooper v. Cooper*, 6 Ch. App. 15."

**Sec. 273. Estoppel as applied to the public.** A contract by a city to vacate a street and void vacation proceedings in pursuance of it do not estop the city to claim the street as a highway, *City of Ashland v. Chicago & N. W. Ry. Co.*, 105 Wis. 398 (80 N. W. Rep. 1101); and in West Virginia it is held that the easement of the public in a highway or street cannot be extinguished in favor of an individual through an equitable estoppel, *Ralston v. Town of Weston*, 46 W. Va. 544 (33 S. E. Rep. 326; 76 Am. St. Rep. 834). See opinion for collation and review of cases; also, *Ballards' Law Real Property*, Vol. VI, § 317. A city which has taxed property

and levied special assessments against it for many years, during all of which time its rights to the property readily could have been ascertained, is estopped to assert title to it as against one who has occupied it during the time under a claim of right. *City of Davenport v. Boyd*, 109 Ia. 248 (80 N. W. Rep. 314; 77 Am. St. Rep. 536).

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## EVIDENCE

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### EPITOME OF CASES.

**Sec. 274. Admissibility of documents and deeds—**  
**Proof of execution—Altered deeds and deeds without stamp.** Assessment lists in which one declares that he owns no property other than that included in them are admissible against one claiming title to property through him which was not listed therein, but should have been had he been the owner of it. *Carter v. Carter*, 92 Me. 225 (42 Atl. Rep. 398). In determining the value of a life estate standard and recognized mortality tables, together with the computation of experts based thereon, are admissible to show the expectancy of life of a life tenant and the value of his estate. *Henderson v. Harness*, 184 Nl. 520 (56 N. E. Rep. 786). The execution of a deed, the certificate of acknowledgment to which is insufficient, may be proved by the officer who signed the certificate, his signature being taken as that of an attesting witness. *Middlebrooks v. Barefoot*, 121 Ala. 642 (25 So. Rep. 102). Construing and applying Ala. Code 1896, § 1797, providing that "the execution of any instrument of writing attested by witnesses may be proved by the testimony of the maker thereof, without producing or accounting for the absence of the attesting witnesses," it is held that the execution of a wife's conveyance of her separate property cannot be proved by the testimony of her husband alone who joined with her in its execution. *Stamphill v. Bullen*, 121 Ala.

250 (25 So. Rep. 928). In Illinois the rule has been adopted that the mere fact of an interlineation or an erasure appearing in an instrument does not, of itself, raise any presumption of law either for or against the validity of the writing, but that the question when, by whom, and with what intent it was made is one of fact to be submitted to the jury. *Catlin Coal Co. v. Lloyd*, 180 Ill. 398 (54 N. E. Rep. 214; 72 Am. St. Rep. 216). The provision in the federal revenue law (Act. Cong., June 13, 1898) that unstamped instruments shall not be admissible in evidence, does not apply to state courts. *Knox v. Rossi*, 25 Nev. 96 (57 Pac. Rep. 179). See *Ballards' Law Real Prop.*, Vol. VI, § 170.

**Sec. 275. Admissibility of ancient deeds.** A deed more than thirty years old found in the proper custody and bearing indorsement indicating its genuineness is admissible in evidence as an "ancient" deed, although less than thirty years old at the date of the commencement of the suit; and the presumption of due execution arising in such a case extends to a power of attorney under which such deed purports to have been executed. *Reuter v. Stuckart*, 181 Ill. 529 (54 N. E. Rep. 1014). The court say: "When this deed was introduced in evidence upon the trial of the cause, it was more than thirty years old, and must therefore be regarded as an ancient deed. It is true that, when the original bill in this case was filed, on October 21, 1897, the deed was not thirty years old; but the rule is that documents more than thirty years old at the date of the trial are 'ancient,' although less than thirty years old at the date of the commencement of the suit. *Gardner v. Granniss*, 57 Ga. 539; *Bass v. Sevier*, 58 Tex. 567; 1 Am. & Eng. Enc. Law, p. 565, note 1. In *Applegate v. Mining Co.*, 117 U. S. 255 (6 Sup. Ct. Rep. 742), the supreme court of the United States say: 'The rule is that an ancient deed may be admitted in evidence, without direct proof of its execution, if it appears to be of the age of at least thirty years, when it is found in proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity, freeing it from all just grounds of suspicion.' In *Whitman v. Heneberry*, 73 Ill. 109, we held

that deeds more than thirty years old are ancient deeds, and may be admitted in evidence without proof of execution; but that, before they can be so admitted, it must appear that the instrument comes from such custody as to show a reasonable presumption of its genuineness, and that facts and circumstances must be proven which will establish the fact that the instrument has been in existence the length of time indicated by its date. Some of the authorities differ as to whether it is necessary to show that possession was taken under the deed. It seems to be settled, however, by the weight of authority, that such possession, if necessary to be shown, need not be for the full period of thirty years, but may be for a less period, if there are other circumstances tending to show the genuineness of the instrument. In *Whitman v. Heneberry*, 73 Ill. 109, it was said that indorsements or memoranda upon the deed, when they are of such character as to satisfy a cautious and discriminating mind that they would not be there if the paper were a forgery, have been considered as circumstances indicating that the deed is genuine. It was there said that, if the deed has been on record for over thirty years, that circumstance is a strong fact in favor of its genuineness. Greenleaf, in his work on Evidence, says that an ancient deed—that is to say, one more than thirty years old—is presumed to be genuine without express proof of its execution, if it is found in the proper custody, and is free from just grounds of suspicion, and is corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof. In such case, the witnesses to the deed are presumed to be dead, and the deed is presumed to have constituted a part of the actual transfer of the property mentioned in it. 1 Greenl. Ev. (15th Ed.) §§ 21, 144.

\* \* \* The deed appears to have been executed by the grantors therein named, by one Robert Reid, as their attorney in fact. It is claimed by the appellant that, on this account, the deed should not have been admitted in evidence, upon the alleged ground that even a deed more than thirty years old, which is executed by an attorney in fact, is not admissible in evidence without proof of the authority of the attorney to execute the deed. There

seems to be some difference of opinion in the text writers, and in the decisions of the courts, as to whether the existence of a valid power of attorney will be presumed in favor of an ancient deed when such deed purports to be executed by an attorney.

"The learned author of the chapter on 'Ancient Documents' in the American & English Encyclopedia of Law (volume 1, p. 566, note 1) says: 'The existence of a valid power of attorney will be presumed in favor of an ancient deed purporting to be executed by an attorney.' In Phillips on Evidence (volume 2, marg. p. 471, note 429) it is said: 'A power to execute a deed will, in many instances, be presumed. In most cases, where the deed would be evidence as an ancient deed, without proof of execution, the power under which it purports to have been executed will be presumed.' We have examined the cases referred to to sustain the statements made by the foregoing text writers, and find that they support the statements so made. In *Robinson v. Craig, 1 Hill, (S. C.) 251*, where a deed stated that it was executed under a power of attorney, and was received in evidence as an ancient deed without proof of its execution, it was held that the power need not be produced; and the court there say: 'Antiquity and other circumstances dispense with the necessity of any proof by witnesses of handwriting, when the deed purports to be executed by the grantor personally, and there seems to be no good reason why they should not have the same effect when it purports to be executed by attorney. The proof of the power would be only one of the facts to make out a due execution.' In *Doe v. Phelps, 9 Johns. 170*, it was said: 'An ancient deed with possession corresponding with it, proves itself; and a power of attorney contained in such deed, and necessary to give it validity or full effect, will equally be embraced by the presumption.' In *Doe v. Campbell, 10 Johns. 475*, it was said: 'The power of attorney under which the title of some of the patentees was conveyed to Van Dam, after so great a lapse of time, and such a universal acquiescence in the Van Dam title, was to be deemed valid, without proof of its execution.' See, also, *Johnson's Adm'r v. Timmons, 50 Tex. 521*; *Storey v. Flanagan, 57 Tex. 649*; *Innman v. Jackson, 4. Greenl. 237*; *Tolman v. Emerson, 4.*



Pick. 160. It has been held that, after an undisputed possession for thirty years of any property, real or personal, it is too late to question the authority of the agent who has undertaken to convey it, unless his authority is by matter of record. *Inhabitants of Stockbridge v. Inhabitants of West Stockbridge*. 14 Mass. 257; 1 Greenl. Ev. (15th Ed.), § 21. Counsel refer to the case of *Fell v. Young*, 63 Ill. 106, as being opposed to the view above announced. In that case an ancient deed was produced, which was made by an administrator, and failed to show upon its face that the court which ordered the sale had jurisdiction over the parties to be affected by it. The rule there announced is correct, as the power there apparent upon the face of the deed was a public and statutory, and not a private, power. Such cases as that of *Fell v. Young*, 63 Ill. 106, involve a question of jurisdiction of the tribunal ordering the deed to be made, and, in such cases, the power should be shown. But, in a case like the one at bar, the proof of the power is only one of the facts to make out a due execution of the deed, and the due execution of the deed is presumed in the case of an ancient deed in view of the great length of time which has elapsed, and in view of the possession taken and other acts done under the deed. We are of the opinion that the court below committed no error in admitting the deed without proof of the execution of a power of attorney authorizing the attorney in fact to execute it."

The fact that possession is not shown to have been taken under an ancient instrument does not affect its admissibility in evidence as such. *Cunningham v. Davis*, 175 Mass. 213 (56 N. E. Rep. 2). Nor does the fact that it has been recorded change its character. Such a deed is not subject to attack as a forged instrument by an affidavit on which separate issue must be made and tried. When offered as an ancient document, it is entitled to admission in evidence as such, without any preliminary proof of execution, and its genuineness can only be attacked by the introduction of evidence on the trial of the case in which it has been admitted as evidence. *McArthur v. Morrison*, 107 Ga. 796 (34 S. E. Rep. 205). Recitals in ancient deeds are proof of the facts therein recited, even as against strangers. *Norris v. Hall*, 124 Mich.

170 (82 N. W. Rep. 832). Citing, *Underhill, Ev.* §§ 53, 54; *Deery v. Cray*, 5 Wall. 795 (18 L. Ed. 653); *Fulker-son v. Holmes*, 117 U. S. 389 (6 Sup. Ct. Rep. 780; 29 L. Ed. 915); *Jackson v. Cooley*, 8 Johns. 127; *Bowser v. Cravener*, 56 Pa. St. 142; *Chamblee v. Tarbox*, 27 Tex. 140 (84 Am. Dec. 614). Under Shannon's Tenn Code, § 3761, a deed which has been registered twenty years or more is admissible in evidence regardless of the omission of essential words in the certificate of acknowledgment or that the acknowledgment appeared to have been taken before an officer not authorized by the statute to take acknowledgments. *Perry v. Clift*, Tenn. (54 S. W. Rep. 121).

**Sec. 276. Admissibility of certified copies of records.**

A certified copy of a deed recorded in the office of the register of deeds of a county in another state is competent to prove the date on which it was recorded there. *Schweigel v. L. A. Shakman Co.*, 78 Minn. 142 (80 N. W. Rep. 871). Construing and applying Ala. Code, § 986, which requires the judges of probate to record "in a fair hand, word for word," conveyances of property, with the acknowledgments, proof, etc., and § 992, making transcripts of the record admissible in evidence, it is held that the presumption that the record made by such an officer is correct is not overthrown by proof that he did not compare the record with the original instrument at the time of recording it. *McIntire v. White*, 124 Ala. 177 (26 So. Rep. 937). Construing 1 N. J. Gen. Stat., p. 876, § 115, providing that copies of wills made in Great Britain devising lands in New Jersey, certified under the seal of the office where the will was proved, shall be admissible in evidence, it is held that in order for a will to be admissible under the statute it must appear to be executed in such manner as the law of New Jersey requires for the devising of real estate in that state, and a transcript of the record of such a will must contain certified copies of the depositions of the witnesses in making the probate. *McCarthy v. McCarthy*, 57 N. J. Eq. 587 (42 Atl. Rep. 332). Under Hill's Ann. Or. Laws, § 3028, the record of a deed or a certified copy thereof is admissible in evidence to show title without proof of the delivery of the deed. *Serles v. Serles*, 35 Or. 289 (57

Pac. Rep. 634). Tex. Rev. Stat. 1895, § 2306, making duly certified copies of public records admissible in evidence, applies only "where the original records would be evidence," and does not render admissible a certified copy of the record of a deed which was not entitled to record. *Heintz v. Thayer*, 92 Tex. 658 (50 S. W. Rep. 929). Such a deed, if material to any issue, may be proved according to the common law. *Heintz v. Thayer*, 92 Tex. 658 (51 S. W. Rep. 640). The introduction into evidence of a mortgage, by means of a certified copy of the record thereof, which contains an entry of satisfaction of the mortgage, thereby carries into evidence such entry. *Cary v. Cary*, 189 Pa. St. 65 (42 Atl. Rep. 19).

**Sec. 277. Parol evidence—Lost or destroyed records.**

The existence of a will may be shown by parol evidence where the record of its probate and registration has been destroyed. *Cox v. Beaufort Co. Lumber Co.*, 124 N. C. 78 (32 S. E. Rep. 381). When the record of a deed has been destroyed by fire and the original instrument has been lost without any fault of those claiming title under it, its execution and contents may be proved by the best evidence of which the nature of the case is susceptible, the same as other instruments. See opinion for particular evidence held sufficient to prove the execution of a deed. *Harrell v. Enterprize Sav. Bank*, 183 Ill. 538 (56 N. E. Rep. 63).

**Sec. 278. Parol evidence—Construction of deeds, etc.**

Compliance with a contract by one party and a fulfillment of its terms by him may be shown by parol evidence. *Abba v. Smyth*, 21 Utah, 109 (59 Pac. Rep. 756). Parol evidence is admissible to show the beneficiary intended by a testator making a bequest to the "Domestic Missionary Society." *Van Nostrand v. Board of Domestic Missions*, 59 N. J. Eq. 19 (44 Atl. Rep. 472). Where the stipulations of a lease as to the rent to be paid are ambiguous, parol evidence as to the real agreement of the parties is admissible, *American Sav. Bank v. Shaver Carriage Co.*, 111 Ia. 137 (82 N. W. Rep. 484); but where the only ambiguity in a written lease specifically providing that the rent shall be payable on the 20th day of each month, which marks the end of each month of the tenancy, is whether the rent is to be paid in

advance or at the end of the tenancy month, parol evidence is inadmissible, *Castleman v. Du Val*, 89 Md. 657 (43 Atl. Rep. 821). Parol evidence is not admissible to show that the words "for all legitimate railroad, depot and warehouse purposes," used in a conveyance of a railroad right of way, were used and understood in a particular sense by the parties to the instrument. *Abraham v. Oregon & C. R. Co.*, 37 Or. 495 (60 Pac. Rep. 899). The terms of a trust deed as to the cestui que trust therein named cannot be altered or changed by parol evidence, where there is no allegation of fraud, surprise or mistake either of law or fact. *American Nat. Bank v. Harlan*, 89 Md. 675 (43 Atl. Rep. 756). Oral testimony is not admissible to explain the meaning of a plat from which it is sought to establish the dedication of a street. *Baltimore & O. S. W. Ry. Co. v. City of Seymour*, 154 Ind. 17 (55 N. E. Rep. 953). Parol evidence is admissible to show that through a mistake certain lands were erroneously listed among lands sold to the state for taxes, and to show a mistake in the dating of a tax deed. *Hinson v. Forsdick*, Miss. (25 So. Rep. 353). The presumption that a deed executed to "John Elliott and Amanda Elliott, his wife," that the woman named is his lawful wife, may be overcome by parol evidence that the woman designated as grantee in the deed was one to whom John Elliott was unlawfully married while having a wife living, also named Amanda Elliott. *Wolff v. Elliott*, 68 Ark. 326 (57 S. W. Rep. 1111). While direct evidence of intention is not admissible in explanation of ambiguous terms in a writing, yet proof of collateral facts and surrounding circumstances existing when the instrument was made may be properly admitted, in order that the court may be placed as nearly as possible in the situation of the contracting parties, as the case may be, with a view the better to adjudge in what sense the language of the instrument was intended to be used, and to apply it to the subject-matter. *Balch v. Arnold*, Wyo. (59 Pac. Rep. 434). For particular cases in which parol evidence was held admissible to aid the court in construing a deed, see *Baker v. Clark*, 128 Cal. 181 (60 Pac. Rep. 677); *Moody v. Alabama G. S. R. Co.*, 124 Ala. 195 (26 So. Rep. 952).

**Sec. 279. Parol evidence—Contemporaneous and collateral agreements.** In construing a deed the contract between the parties in pursuance of which the deed was executed is admissible in evidence, *Mills v. Chicago & N. W. Ry. Co.*, 103 Wis. 192 (79 N. W. Rep. 245); but parol evidence is inadmissible to show a part of an agreement alleged to form a consideration for a deed which was not reduced to writing, where the deed not only was complete as a conveyance, but as showing a contract and condition upon which the conveyance was made, *McEnery v. McEnery*, 110 Ia. 718 (80 N. W. Rep. 1071). A parol promise on the part of a grantor to pay a mortgage on the premises conveyed cannot be established where the terms of his conveyance clearly show that as between himself and his grantee he was absolved from all responsibility for such debt, no fraud or mistake being shown. *Desmond v. McNamara*, 107 Wis. 126 (82 N. W. Rep. 701). A general liability upon a bond accompanying a mortgage given for purchase money of real estate may be restricted by proof of a contemporaneous oral agreement, in which it was agreed that there was to be no personal liability on the bond, but that the amount thereof should be collectible alone out of the property conveyed. *Schweyer v. Walbert*, 190 Pa. St. 334 (42 Atl. Rep. 694).

**Sec. 280. Parol evidence—Proof of consideration.** The true consideration for a deed may be shown by parol evidence, *Langan v. Iverson*, 78 Minn. 299 (80 N. W. Rep. 1051); *Perkins v. McAuliffe*, 105 Wis. 582 (81 N. W. Rep. 645); *Miller v. Livingston*, 22 Utah, 174 (61 Pac. Rep. 569); but parol evidence is not admissible to add to, change or vary the consideration of a deed where such consideration is fully expressed by the language of the deed, *Schrinner v. Chicago, M. & St. P. Ry. Co.*, Ia. (82 N. W. Rep. 916); *Trice v. Yeoman*, 60 Kan. 742 (57 Pac. Rep. 955). A grantee's agreement to assume and pay the mortgage debt, as a part of the consideration for the premises conveyed to him, may be proved by parol. *Miller v. Kennedy*, 12 S. Dak. 478 (81 N. W. Rep. 906). Citing numerous authorities. Recitals as to the consideration in a deed may be explained by parol evidence. *Harts v. Emery*, 184 Ill. 560 (56 N. E. Rep. 865). Where a deed recites that

it is made "for and in consideration of the sum of five (\$5) dollars and other valuable consideration," parol evidence is admissible to prove what the parties meant by the use of the words, "and other valuable consideration." *Alexander v. McDaniel*, 56 S. C. 252 (34 S. E. Rep. 405). Where a deed from a husband to his wife which is assailed as a fraud upon his creditors recited a consideration of five dollars, "and the further consideration of love and affection for my said wife," the real consideration may be shown to have been a parol antenuptial contract to convey the land. *Barnes v. Black*, 193 Pa. St. 447 (44 Atl. Rep. 550; 74 Am. St. Rep. 694).

**Sec. 281. Evidence of value of land—Opinions.** The tax valuation placed upon land by the tax assessors without the interference of the landowner, although not objected to as too low at the time, is not admissible against him as evidence of its value. *Ridley v. Seaboard & R. R. Co.*, 124 N. C. 37 (32 S. E. Rep. 379). Citing, *Daniels v. Fowler*, 123 N. C. 35 (31 S. E. Rep. 598); *Flint v. Flint*, 6 Allen, 34 (83 Am. Dec. 615); *Kenerson v. Henry*, 101 Mass. 152. In determining the value of land which is valued principally for its timber, evidence of the market value of the timber itself at near-by market, there being no market at the land, and of the cost of marketing the timber, is admissible. *Ladd v. Ladd*, 121 Ala. 583 (25 So. Rep. 627). Opinions of witnesses as to the value of land are admissible only when they are acquainted with the particular land in question and have knowledge of the value thereof. *Board of Levee Com'rs v. Dillard*, 76 Miss. 641 (25 So. Rep. 292).

**Sec. 282. Declarations affecting realty interests.** Declarations by one in disparagement of his title are admissible against persons subsequently claiming under him, *Carter v. Clark*, 92 Me. 225 (42 Atl. Rep. 398); but a grantor's declarations made after he has parted with his title cannot defeat the title of his grantee, *Baldwin v. Stier*, 191 Pa. St. 432 (43 Atl. Rep. 326); *Lent v. Shear*, 160 N. Y. 462 (55 N. E. Rep. 2); *Cedar Rapids Nat. Bank v. Lavery*, 110 Ia. 575 (81 N. W. Rep. 775; 80 Am. St. Rep. 325); *Snow v. Rich*, 22 Utah, 123 (61 Pac. Rep. 336). Declarations of the grantor in a lost deed made after the

execution of the deed as to what land he had conveyed are not admissible in an action involving the reformation of the description in such deed. *Nicholson v. Tarpey*, 124 Cal. 442 (57 Pac. Rep. 457). The declarations of ancient persons while in the possession of land owned by them, pointing out the boundaries on the land itself, and who are deceased at the time of the trial, are admissible in evidence when nothing appears to show that they were interested in thus pointing out their boundaries. *Wilson v. Rowe*, 93 Me. 205 (44 Atl. Rep. 615).

**Sec. 283. Judicial notice and presumptions.** A court will take judicial notice that sections eight and seventeen in a certain township and range lie north and south of each other, *Briant v. Garrison*, 150 Mo. 655 (52 S. W. Rep. 361); and that a particular piece of land is arid, and must be irrigated to be of use for agricultural purposes, *Slattery v. Harley*, 58 Neb. 575 (79 N. W. Rep. 151). A deed in possession of the grantee will be presumed to have been executed on its date. *Bailey v. Selden*, 124 Ala. 403 (26 So. Rep. 909). The disappearance of an unmarried man and his continuing unheard of for a sufficient length of time to warrant the presumption of his death may authorize the further presumption that he continued unmarried and died without issue, where it appears that he was only from fourteen to sixteen years of age when he disappeared and there is some evidence tending to show that he died unmarried and left no children. *Nehring v. McMurray*, Tex. (57 S. W. Rep. 943). Under Cal. Code Civ. Proc., §§ 1614, 1963, subd. 39, a deed is presumptive evidence of a consideration therefor, and the burden of showing the want of consideration is on the party alleging it. *Blair v. Squire*, 127 Cal. XVII (59 Pac. Rep. 211). *Hurd's Ill. Rev. Stat. 1897*, p. 1292, construed and applied—*Burnt Records Act*—presumption as to due execution of deeds—exception in favor of person in adverse possession of land at the time of the destruction of the records. *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70 (56 N. E. Rep. 1088).

**Sec. 284. Competency of witnesses—Statutes construed.** An action against an administrator to establish a resulting trust in land constitutes a "claim or demand"

against the estate, under *Ida. Rev. Stat.*, § 5957, so as to disqualify the plaintiff as a witness as to matters of fact occurring before the death of the decedent. *Rice v. Rigley*, *Ida.* (61 *Pac. Rep.* 290). *Ia. Code*, § 4604, construed and applied—competency of witness as to transactions with a decedent. *Chew v. Holt*, 111 *Ia.* 362 (82 *N. W. Rep.* 901). A statute (*N. C. Code*, § 590) making a party incompetent in his own behalf as to transactions and communications with a decedent, does not render a devisee under a will, the probate record of which has been destroyed, incompetent to testify that he found the will and caused it to be probated. *Cox v. Beaufort Co. Lumber Co.*, 124 *N. C.* 78 (32 *S. E. Rep.* 381). Construing and applying *Pa. Laws 1887*, p. 159, § 5, cl. e, providing that any person whose interest shall be adverse to the right of a decedent shall not be a competent witness as to any matter occurring before his death, it is held that a plaintiff in an action of ejectment involving the right of a deceased person to make a conveyance to the defendant, is not a competent witness on this point. *Baldwin v. Stier*, 191 *Pa. St.* 432 (43 *Atl. Rep.* 326). *Shannon's Tenn. Code*, § 5598, construed and applied—competency of witness as to transaction with decedent. *Sellers v. Sellers*, *Tenn.* (53 *S. W. Rep.* 316). *Wis. Rev. Stat.*, § 4069, construed and applied—competency of witnesses as to transactions with decedent. *Wollman v. Ruehle*, 104 *Wis.* 603 (80 *N. W. Rep.* 919).

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## EXECUTION SALES

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### EPITOME OF CASES.

**Sec. 285. What real estate may be sold on execution.** A devisee entitled to share in the proceeds of land directed to be sold, and which is thus equitably converted into personality, has no interest in the land itself which can be subjected to an execution by his creditor. *Robison v. Botkin*, 181 *Ill.* 182 (54 *N. E. Rep.* 915). In Iowa it is held that



until a husband's distributive share in his wife's estate is set aside or admeasured it is not subject to levy under an execution against him. *Brightman v. Morgan*, 111 Ia. 481 (82 N. W. Rep. 954). In Tennessee it is held that the levy of an execution on land subject to a mortgage is void on its face, as being a levy on an equitable interest in land. *Wilkins v. Johnson*, Tenn. (54 S. W. Rep. 1001). One taking the legal title to real estate charged with a resulting trust in favor of another who paid the purchase price and to whom he afterward makes a deed upon his discovery of the fraud, has no estate therein subject to execution, although a levy is made before the recording of the last deed. Mich. Comp. Laws, §§ 8837, 9224, construed and applied. *Uhl v. Weiden*, 122 Mich. 638 (81 N. W. Rep. 571). Lands held under a certificate of purchase from the state, the holder of which is entitled to a patent from the governor, under Mich. Comp. Laws, § 1332, are subject to execution for the holder's debt prior to the issuance of a patent. *Foster v. Whelpley*, 123 Mich. 350 (82 N. W. Rep. 123). Where two people enter into a verbal agreement that one of them will furnish the purchase price of certain land, and that the other will attend to the purchase of the land in consideration of receiving one-half of the profits which may afterward accrue from a resale of the land, and the land is so purchased, the second party taking a deed in his own name, and later, by two separate conveyances, transferring to the first party first one and then the other undivided half of the land, the second party at no time has an interest in the land subject to seizure and sale under the execution. *Perkins v. Meighan*, 147 Mo. 617 (49 S. W. Rep. 498; 71 Am. St. Rep. 586). Kan. Gen. Stat. 1899, § 4742 et seq., construed and applied—sale on inferior judgment of land once sold. *Case v. Cherokee Lanyon Spelter Co.*, 62 Kan. 69 (61 Pac. Rep. 406).

**Sec. 286. Execution sale of lands fraudulently conveyed—Statutes construed.** An execution sale made by a judgment creditor of a failing debtor of land alleged to have been fraudulently conveyed by him made after the commencement of a suit by another creditor to set aside the conveyance as fraudulent and have a sale of the land does not confer any rights as against the plaintiff in such

action who purchases the property at a sale thereunder. *Preston-Parton Milling Co. v. Dexter Horton & Co.*, 21 Wash. 236 (60 Pac. Rep. 412; 79 Am. St. Rep. 928). Under a statute (*Ariz. Rev. Stat.*, § 2031) declaring deeds made to defraud creditors void, it is held that such a conveyance does not divest the grantor of his title as against his judgment creditor, and the latter may sell the property on execution against the grantor without vacating the conveyance. *Rountree v. Marshall*, Ariz. (59 Pac. Rep. 109). *Mass. Pub. Stat.*, ch. 172, §§ 1, 49, construed and applied—sale of lands fraudulently conveyed. *Berry v. Gates*, 175 Mass. 373 (56 N. E. Rep. 581). *Mich. Comp. Laws* 1857, § 2119, as amended by *Laws* 1867, No. 95, construed and applied—action by judgment creditor levying upon lands fraudulently conveyed by his debtor, to determine the latter's rights therein—limitations. *Daniel v. Palmer*, 124 Mich. 325 (82 N. W. Rep. 1067). *Vt. Stat.*, § 1848, construed and applied—levy of execution on land fraudulently conveyed—action by levying creditor. *Corey v. Morrill*, 71 Vt. 51 (42 Atl. Rep. 976).

**Sec. 287. Estate of vendor subject to execution sale.**

A vendor who has given a bond for title upon receipt of a part of the purchase price has no interest which can be sold on execution against him, *Strauss v. White*, 66 Ark. 167 (51 S. W. Rep. 64); and the fact that land conveyed to a purchaser has not been paid for does not make it subject to levy on execution against the vendor, *Pryor v. Warford*, Ky. (54 S. W. Rep. 838; 21 Ky. Law Rep. 1311). But the interest of a vendor who has contracted to convey land upon the payment of the purchase price but who has not received all of the purchase money is not that of a mere naked trustee for the vendee, but he holds not only the legal title but a beneficiary estate in the lands to the extent of the unpaid purchase money, and such interest of the vendor is subject to levy by attachment on the land, and it is not essential that garnishee process be served on the grantee. *Coggs v. Marine Bank Co.*, 63 O. St. 88 (57 N. E. Rep. 1086).

**Sec. 288. Exemption of cemetery lands from execution sale.** Lands belonging to a cemetery company, chartered under *Tex. Rev. Stat.*, § 642, subd. 5, which have been

dedicated for cemetery purposes and platted and laid out into lots, some of which have been sold and used for burial purposes, as authorized by §§ 715-717, afterwards cannot be sold on execution to pay the debts of the corporation. *Oakland Cemetery Co. v. People's Cemetery Ass'n*, 93 Tex. 569 (57 S. W. Rep. 27). The court say: "When the Oakland cemetery corporation laid out its lands into lots and subdivisions, and caused a plat of the land to be made and recorded in the office of the county clerk of Dallas county, the land so laid out was irrevocably dedicated to use as a place for burial for the dead, just as effectually as if the statute had stated that it should be so dedicated. The use prescribed is public in its nature, and of a character that necessarily excludes any concurrent use of the same property. Consequently the use is exclusively for purposes of sepulture. After the dedication of the land, the legal title remained in the corporation only for the purpose of conveying the lots to those who desired to use them for the purpose of burying the dead. No power is given by the statute to such corporations to convey the property for any other purpose, and the fact that the lots and subdivisions are made unchangeable, and that the power to convey is restricted to the conveyance of 'any lot or lots \* \* \* for purposes of sepulture,' operates as a limitation upon the power of the corporation to convey the land to 'a lot or lots,' and for the uses named. Upon dedication the dominion of the corporation over the land as owner in fee simple was surrendered, and the corporation became, in effect, a trustee to sell and convey the lots for the purposes specified, and to carry out the purposes enumerated in the statute, with the right to appropriate the proceeds of the sale to itself in payment of the land. Each lot owner became a member of the corporation in the sense that he was entitled to participate in all elections for officers to manage the corporate business, and each was interested not only in the particular lot conveyed to him, but in the entire ground of the cemetery, to be kept as an entirety, and to be perpetuated and cared for by a corporate body. The rights of lot owners in such a cemetery are so well expressed in the case of *Close v. Glenwood Cemetery*, 107 U. S. 466 (2 Sup. Ct. Rep. 267; 27 L. Ed. 408), that we copy from that opinion as follows: 'It was held out to the lot

holders, not only that the ground immediately available for burial should remain set apart for that object, but that the cemetery should be forever under the protection of a perpetual corporation, charged with the duty of laying out and ornamenting grounds, capable of receiving gifts and bequests, and empowered to make by-laws for the regulation of the affairs of the corporation; and the whole property was described as dedicated to the purposes of the cemetery, not necessarily that the whole should be laid out into lots, but that it should all belong to the institution, and be available for its general objects. This was not to be a mere graveyard, in which each lot holder acquired a piece of ground in which to bury his dead, and at the same time became chargeable with the sole care of his particular lot; but the lot holders themselves became subject to by-laws and regulations having reference to the institution as an entirety, and the perpetual preservation of the cemetery as an ornamental and convenient place for interment and for resort by the relatives of the dead.' Every point made in the opinion quoted from is embraced in and fully covered by the provisions of our statute. Each lot owner has in view that the cemetery ground as a whole shall be improved and ornamented so as to make it a pleasant place of resort for the friends and relatives of the deceased persons who may be buried there, as well as a place for interment for the dead. The Oakland cemetery corporation was created for the purpose of carrying out the provisions of the statute, and of perpetuating and preserving this ground as a place of burial, and to protect and preserve the rights of the various lot owners therein. The power to create debts on the faith of property dedicated to such a use, in which the lot owners have such special interest, is wholly inconsistent with the limitations which the statute places upon the power of the corporation, and with the use to which the land is set apart, and would be destructive of the rights acquired by the lot owners in making their purchases in such grounds. *Wolford v. Association*, 54 Minn. 440 (56 N. W. Rep. 56). Under our statute, a cemetery corporation has no power to create debts on the faith of the lands dedicated to burial purposes, and the sheriff had no power, under the executions, to sell the lands in question. Such sale would inevitably destroy every right

growing out of corporate management of the cemetery, which are in fact the most sacred of all the rights of owners of lots in a cemetery. The fact that another corporation has been formed, and has undertaken to carry out the purposes of the dedication, does not affect the legal question, for if Tenison and Sumpter had the right to buy the property, and afterward to convey it to a corporation, they might have held it in their individual right; thus depriving the lot owners of the valuable benefits of corporate management and improvement of the cemetery grounds, and of their right of participation in the management and control of such grounds."

**Sec. 289. Issue of execution.** The fact that an execution issued to an officer of a county other than that in which the judgment originally was entered, but in which it afterward was filed, bore date prior to such filing, does not render a sale thereunder void. *Hoerr v. Meihof*, 77 Minn. 228 (79 N. W. Rep. 964; 77 Am. St. Rep. 674). Construing and applying Cal. Code Civ. Proc., § 682, providing that an execution shall be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, it is held that an execution to which is affixed by his deputy the signature of a clerk whose term expired several months prior to the issuance of the execution, is void. *O'Donnell v. Merguire*, Cal. (60 Pac. Rep. 981). An execution for the sale of property, authenticated with the seal of the court, but lacking the signature of the clerk issuing it, may be amended after its return by order of court upon the clerk to sign it, if necessary to validate proceedings under it. *Taylor v. Buck*, 61 Kan. 694 (60 Pac. Rep. 736; 78 Am. St. Rep. 346). An erroneous recital in an execution on real property as to the date of the judgment in pursuance of which it was issued will not prejudice the rights of third persons claiming through a sale under it or through the judgment plaintiff, where the execution defendants took no steps to arrest the enforcement of the execution. *Courtland Wagon v. Shields*, Tenn. (56 S. W. Rep. 275). While a motion to set aside or quash an execution may be made to the court which issued it, for errors and irregularities which affect the writ itself, the same is not true in the absence of statute regarding

errors and irregularities arising out of the acts of the officer executing the writ, but the remedy is by action. *Froelich v. Aylward*, 11 S. Dak. 635 (80 N. W. Rep. 131). Where injunction proceedings by an execution debtor against a sale of his lands levied upon under an execution are dismissed after his death, the sale properly may be made under an alias execution. *Rain v. Young*, 61 Kan. 428 (59 Pac. Rep. 1068; 78 Am. St. Rep. 325). The principle of this case is approved and followed in the case of *First Nat. Bank v. Farmers' Nat. Bank*, 61 Kan. 620 (60 Pac. Rep. 324), construing and applying Kan. Gen. Stat. 1897, ch. 95, § 468. Neb. Code Civ. Proc., § 491c, construed and applied—certificate of liens. *Orcutt v. Polsley*, 59 Neb. 575 (81 N. W. Rep. 616). Pa. Laws 1845, p. 538, construed and applied—issue of execution on judgment more than five years old. *Sherrard's Ex'rs v. Johnson*, 192 Pa. St. 166 (44 Atl. Rep. 252; 74 Am. St. Rep. 680). For particular descriptions held sufficient, see *Hughes v. Helms*, Tenn. (52 S. W. Rep. 460).

**Sec. 290. Levy of execution.** Where an officer levying an attachment on land makes an entry in a proper record, reciting the fact of the levy, and endorses the return to the same effect on the writ, the levy attaches so as to create a lien from that time, as against subsequent incumbrances, although they were executed before notice of the levy of the attachment was served on the defendant, as required by Ia. Code 1873, § 2967. *Schoonover v. Osborne*, 111 Ia. 140 (82 N. W. Rep. 505). Where the statute (Ida. Rev. Stat., § 4307) requires copies of a writ of attachment, description of the property, and notice of levy to be served on the occupant, if there be one, and, if there be none, the posting of such copies in a conspicuous place on the land levied upon, it is not a sufficient compliance with such provisions to serve such copies on the owner, who is not an occupant of the land. *Williams v. Olden*, Ida. (61 Pac. Rep. 517). The levy of an execution upon real estate under a judgment does not prolong the duration of the lien thereof as fixed by statute (Utah Comp. Laws 1888, § 3414), nor does it create a new lien upon the property. *Smith v. Schwartz*, 21 Utah 126 (60 Pac. Rep. 305). Though a judgment may give to the plaintiff therein a

special lien upon described realty, to which, under the pleadings, she was not entitled, this affords no cause for dismissing the levy upon that realty as the property of the defendant in execution under an execution issued upon such judgment, when it appears that the same embraced not only the special lien, but also a general lien on all the property of that defendant. *Marshall v. Charland*, 109 Ga. 306 (34 S. E. Rep. 671).

**Sec. 291. Appraisement of property and notice of sale.**

Construing and applying Ind. Rev. Stat. 1894, §§ 585, 744 (Rev. Stat. 1901, §§ 585, 744), an execution sale of property made for a price greatly below its value without any previous appraisement will be set aside, where it does not appear that a sale without appraisement was ordered in the judgment under which the sale was made. *Bollman v. Gemmill*, 155 Ind. 33 (57 N. E. Rep. 542). A sheriff's deed which shows on its face that the notice of sale was not given in the manner provided by the statute (Sand. & H. Ark. Dig., § 3095) is void. *Russell v. Williamson*, 67 Ark. 80 (53 S. W. Rep. 561). The amendment of a notice of an execution sale during the course of its publication, made by the judgment creditor adding the description of other real estate without changing the date of the sale, as to which sufficient notice is not given, does not affect the validity of the notice as to the land originally included in it. *Bradley v. Heffernan*, 156 Mo. 653 (57 S. W. Rep. 763).

**Sec. 292. Power of officer to adjourn sale—Manner of making sale—Mandamus to compel officer to make.** Where a sheriff, having duly advertised a sale of real estate under an execution, struck off the property to the highest bidder at the time and place so advertised, after which the persons attending the sale and those interested in it dispersed, he cannot effect a legal adjournment of the sale, upon the purchaser having refused to comply with his bid, by returning to the place of sale, and shortly before the expiration of the advertised hours for the sale, publicly announcing that it was adjourned for two weeks. *Weatherby v. Slape*, 58 N. J. Eq. 550 (43 Atl. Rep. 898; 78 Am. St. Rep. 627). The failure to offer in separate tracts is an irregularity on the part of the officer which may furnish to

the owner sufficient ground to have the sale set aside upon a proper and seasonable application therefor, but until the sale is vacated by some direct proceeding it will be valid. *Palmer v. Riddle*, 180 Ill. 461 (54 N. E. Rep. 227). *Hurd's Ill. Rev. Stat.*, ch. 77, § 12, construed and applied—sale of lands susceptible of division. *Henderson v. Harness*, 184 Ill. 520 (56 N. E. Rep. 786). *Ga. Civ. Code*, § 4770, construed and applied—liability of officer for failure to sell property levied upon—measure of damages. *Wilkins v. American Freehold Land Mortg. Co.*, 106 Ga. 182 (32 S. E. Rep. 135). Mandamus will not lie to compel a sheriff to sell real estate levied upon by him under an execution issued upon an ordinary money judgment. *State v. Cone*, 40 Fla. 409 (25 So. Rep. 279; 74 Am. St. Rep. 150). Citing, *Habersham v. Sears*, 11 Or. 431 (5 Pac. Rep. 208; 50 Am. Rep. 481).

**Sec. 293. Sheriff's deed.** Two sales of the same property, at the same time, to the same purchaser, upon execution in favor of the same creditor, may be embraced in the same deed. Construing and applying *Me. Rev. Stat.*, ch. 76, § 36, providing that the officer shall execute and deliver to the purchaser a "sufficient" deed, without defining what shall be deemed a "sufficient" deed, it is held that a sheriff's deed is not invalid merely for the reason that it does not disclose the date of the execution upon which the land was sold, nor the amount of the judgment, debt and costs, nor the name of the court from which the execution issued, as these facts may be shown by the return of the execution. *Hill v. Reynolds*, 93 Me. 25 (44 Atl. Rep. 135; 74 Am. St. Rep. 329). In Missouri it is held that a sheriff making a defective deed may correct it by amendment while still in office without leave of the court, and the deed as amended will relate back to the date of the sale and vest title in the purchaser from that time. *Ozark Land & Lumber Co. v. Franks*, 156 Mo. 673 (57 S. W. Rep. 540). *Mills' Ann. Colo. Stat.*, § 2555, construed and applied—recitals in sheriff's deed as evidence of title. *Bay State Min. & Town-Site Co. v. Jackson*, 27 Colo. 139 (60 Pac. Rep. 573).



**Sec. 294. Title, rights and liabilities of purchaser.** A purchaser at an execution sale founded on a judgment against the landowner is within the meaning of the term "purchasers" as it is employed in the recording acts. *McCandless v. Inland Acid Co.*, 108 Ga. 618 (34 S. E. Rep. 142). A purchaser of land at an execution sale in which the execution defendant had no interest but merely held the legal title for the benefit of others, acquires no title thereto, although the deed to the execution defendant was absolute in form and recorded. *Colyar v. Capitol City Bank*, 103 Tenn. 723 (54 S. W. Rep. 977). A purchaser at a sheriff's sale made in compliance with Mo. Rev. Stat. 1889, § 543, requiring the sheriff to declare in his return that "he has attached all the right, title, and interest of the defendant," acquires all the interest of the defendant in the land, and not merely an equity of redemption, regardless of a statement in the notice of sale that the same was made subject to all prior liens and judgments, and such purchaser may contest the validity of a prior trust deed on the property made to hinder and delay creditors. *Huffman v. Nixon*, 152 Mo. 303 (53 S. W. Rep. 1078; 75 Am. St. Rep. 454). A sale of land in another county by the sheriff, under direction of the execution defendant who subsequently recognizes the validity of the sale, is sufficient to confer on the purchaser at least a constructive right to possession from which he could not be ousted by a junior in possession of no higher dignity. *Sorrell v. Samuels*, Ky. (49 S. W. Rep. 762; 20 Ky. Law Rep. 1498). A purchaser of the mortgagor's interest in mortgaged premises acquires his rights in respect to the rents and profits thereof. *Clark v. Missouri, K. & T. Trust Co.*, 59 Neb. 53 (80 N. W. Rep. 257). A judgment creditor who purchases at his own execution sale, after confirmation of the sale and execution of a deed, cannot have the sale set aside upon discovery that the interest of the judgment debtor in the property was not so great as he believed it to be, where his erroneous impression in this particular resulted partly by his own and other people's investigation and partly from the representations of the debtor, which it is not shown he knew to be false at the time they were made. *Poppleton v. Bryan*, 36 Or. 69 (58 Pac. Rep. 767). When a successful bidder, at a sale of property made by the sheriff under execution,

does not pay or tender the amount of his bid in cash, but, without any knowledge or consent of the plaintiff in execution, relies on an arrangement made with the sheriff to receive the money from another source, he is not, if the arrangement so made is not productive of the amount bid, so as to be promptly available to the plaintiff in execution, entitled to restrain a resale of the property, nor require a conveyance to him; and this is so, whether the sheriff acted in good or bad faith in failing to execute the arrangement made. *Simmons v. Cook*, 109 Ga. 553 (34 S. E. Rep. 1033). The execution creditor or debtor are not necessary parties to a mandamus proceeding brought to compel an officer making an execution sale to receive the bid of the purchaser and execute a conveyance to him. *State v. Scarborough*, 56 S. C. 48 (33 S. E. Rep. 779). For exhaustive note on "Title acquired by purchaser at his own execution sale," see 79 Am. St. Rep. 947-953.

**Sec. 295. Validity of sales—Setting aside.** In Kansas it is held that a sale of real estate made under a special execution issued after the death of the plaintiff in the decree, without a review of the judgment, is void. *Seeley v. Johnson*, 61 Kan. 337 (59 Pac. Rep. 631; 78 Am. St. Rep. 314). A sale under a dormant writ is void, and the fact that the defendant in the writ has notice of the time and place of the sale will not estop him from afterward attacking such sale when an effort is made to dispossess him by one asserting title under it. *Davis v. Comer*, 108 Ga. 117 (33 S. E. Rep. 852; 75 Am. St. Rep. 33). The taking of an assignment of a judgment by a purchaser at an execution sale between the time of the levy and the date of the sale does not operate as a payment of the judgment so as to affect the validity of the sale. *Bradley v. Heffernan*, 156 Mo. 653 (57 S. W. Rep. 763). Where a judgment is a lien on two pieces of land, a party who has taken a deed from the judgment debtor of one of the pieces of land, and afterward obtains an assignment of the judgment to himself, may enforce the judgment by a sale of the other piece of land; and such a sale is not void on account of a merger of the judgment. *Clark v. Glos*, 180 Ill. 556 (54 N. E. Rep. 631; 72 Am. St. Rep. 223). A sale on an execution erroneously stating the amount of the judgment on which it is

issued to be greater than that actually due is not invalid on account of that fact, as against the execution debtor's grantee without consideration. *Berry v. Gates*, 175 Mass. 373 (56 N. E. Rep. 581). The court say: "While there is some conflict on this question, the weight of authority is in favor of the view that an execution which issues upon a judgment in an action, although it erroneously states the amount of the judgment, is amendable, and is therefore voidable only, and not void, and that the sale under it is valid, even if it is not amended. *Walker v. McKnight*, 15 B. Mon. 467 (61 Am. Dec. 190); *Avery v. Bowman*, 40 N. H. 453 (77 Am. Dec. 728); *Jackson v. Walker*, 4 Wend. 462; *Parmelee v. Hitchcock*, 12 Wend. 96; *Peck v. Tiffany*, 2 Comst. 451; *Hunt v. Loucks*, 38 Cal. 372 (99 Am. Dec. 404); *Phillips v. Coffee*, 17 Ill. 154 (63 Am. Dec. 357); *Durham v. Heaton*, 28 Ill. 264 (81 Am. Dec. 275); *Cunningham v. Felker*, 26 Ia. 117; *Becker v. Quigg*, 54 Ill. 390; *Miles v. Knott's Lessee*, 12 Gill & J. 442. See, also, *Dewey v. Peeler*, 161 Mass. 135 (36 N. E. Rep. 800; 42 Am. St. Rep. 399)."

A voidable sale will not be set aside as against a bona fide purchaser from the holder of the sheriff's deed, who is not chargeable with any fraud or notice of the irregularity. An objection to the validity of a sale on the ground that alienated property of the judgment debtor has not been sold in the inverse order of its alienation, in order to be available, must be made by the party interested at the first opportunity, where it appears that the party making the sale had no knowledge of the irregularity. The same rule applies to objections on the ground of inadequacy of price or on account of the property having been sold improperly en masse. *Clark v. Glos*, 180 Ill. 556 (54 N. E. Rep. 631; 72 Am. St. Rep. 223). In an action to set aside an execution sale the purchaser may maintain a cross complaint to quiet his title. *Stephenson v. Deuel*, 125 Cal. 656 (58 Pac. Rep. 258).

**Sec. 296. Attachment sales.** One levying an attachment upon the land of his debtor takes subject to the interest of a prior purchaser of the land. *Spratt v. Allen*, Ky. (50 S. W. Rep. 234; 20 Ky. Law Rep. 1824). Title acquired by purchase at a sale under a judgment in

attachment proceedings cannot be defeated on a collateral attack by proof of the death of the attachment defendant before rendition of the judgment, where it appears that the action was brought and the writ levied prior to his death. *Shea v. Shea*, 154 Mo. 599 (55 S. W. Rep. 869; 77 Am. St. Rep. 779). Ky. Civ. Code Prac., § 217 construed and applied—sufficiency of description in sheriff's return of property levied on in attachment. *Price v. Taylor*, Ky. (57 S. W. Rep. 255). Me. Rev. Stat. 1883, ch. 76 § 38 construed and applied—completion of seizure under attachment within 30 days. *Brown v. Allen*, 92 Me. 378 (42 Atl. Rep. 793). Mo. Rev. Stat. 1889, § 543 construed and applied—levy of writ of attachment—lien. *Winningham v. Trueblood*, 149 Mo. 572 (51 S. W. Rep. 399).

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## EXECUTORS AND ADMINISTRATORS

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### EPITOME OF CASES.

**Sec. 297. Contracts and conveyances by executors and administrators.** Executors invested with an imperative power of sale, with the broadest discretion as to terms and conditions, may enter into a contract to convey the land and may maintain an action to compel specific performance thereof by the other party. *Strauss v. Bendheim*, 162 N. Y. 469 (56 N. E. Rep. 1007). Ia. Code 1873, § 2402, providing that "if there be no heir or devisee present and competent to take possession of the real estate left by such decedent, the executor may take possession of such real estate and demand and receive the rents and profits therefor, and do all other acts relating thereto which may be for the benefit of the person entitled to such real estate," does not authorize an administrator to bind the estate for the payment of notes executed by him in pursuance of an ex parte order by the court of which no notice was given to the persons entitled to the estate for money borrowed to make repairs on the estate, but which was not needed

nor used for that purpose. *Valley Nat. Bank v. Crosby*, 108 Ia. 651 (79 N. W. Rep. 383). Construing and applying Ky. Gen. Stat., ch. 39, art. 1, § 1, providing that an executor "shall not act as such to any extent until the will, or an authenticated copy of it, is admitted to record, and he has executed a bond and taken the oath required by law," it is held that a contract by a foreign executor for the sale of land in Kentucky before he had qualified in that state is voidable merely, and his subsequent qualification relates back so that a purchaser, having failed to repudiate the contract before that time, could not thereafter do so. *Allison v. Cocke's Ex'rs*, Ky. (51 S. W. Rep. 593; 21 Ky. Law Rep. 434). Under Cal. Code Civ. Proc., § 1561, confirmation of an executor's sale by the court is necessary to authorize a conveyance and to vest title in the purchaser, although he was authorized to make the sale without an order of the court. *Bennallack v. Richards*, 125 Cal. 427 (58 Pac. Rep. 65). Cal. Code Civ. Proc., § 1578 construed and applied—order for administrator's mortgage—validity and construction. *Fast v. Steele*, 127 Cal. 202 (59 Pac. Rep. 585). For note on general power of executors and administrators over real property, see 78 Am. St. Rep. 175-178.

**Sec. 298. Sale and conveyance under power of sale in will.** A mere naked power given to an executor to make a sale of land carries no estate or title to him, but the legal estate and right to possession descends to the testator's heirs at law. *In re Journey's Estate*, 7 Del. Ch. 1 (44 Atl. Rep. 795). Where, by the terms of a will, persons named therein as executors are given as trustees unrestricted power to sell and convey the whole or any part of the testator's estate, under such power they may sell and convey lands lying in another state, although the will has not been duly probated and recorded in the latter state. *Green v. Alden*, 92 Me. 177 (42 Atl. Rep. 358). A power given to an executrix to sell and convey land includes a power to release it from any liens. *Gill v. Anglo-American Ass'n*, Ky. (52 S. W. Rep. 929; 21 Ky. Law Rep. 690). A power to sell real estate at their discretion given by a testator to his wife and a friend who are appointed by the will as his executrix and executor and which vests in them in their representative character may be exercised by the executrix after the death of the executor.

Where it is doubtful whether a power has been exercised legally or illegally in favor of innocent purchasers and meritorious claimants, the legal execution will be presumed. *Fitzgerald v. Standish*, 102 Tenn. 383 (52 S. W. Rep. 294). Where a power of sale given a testatrix by a will plainly and unequivocally limits the purpose for which any sale can be made to that of reinvestment only, it does not authorize her to mortgage the property or convey it as security for a debt. *McMillan v. Cox*, 109 Ga. 42 (34 S. E. Rep. 341). For construction of particular powers of sale in wills, see *Ross v. Barr's Ex'r*, Ky. (53 S. W. Rep. 658; 21 Ky. Law Rep. 974); *Cowan v. Cowan*, Tenn. (53 S. W. Rep. 1101).

**Sec. 299. Rights as to rents and crops—Statutes construed.** Mont. Code Civ. Proc., §§ 2720, 2722 construed and applied—lease of decedent's land by executor or administrator under order of court—procedure. *State v. Second Judicial Dist. Court*, 24 Mont. 1 (60 Pac. Rep. 489). Ohio Rev. Stat., §§ 6026, 6027 construed and applied—right of administrator of tenant for life or his lessee to crops and rents. *Noble v. Tyler*, 61 O. St. 432 (56 N. E. Rep. 191; 48 L. R. A. 735). 1 S. C. Rev. Stat., § 2049 construed and applied—title of executor or administrator to decedent's crops. *Berry v. Berry*, 55 S. C. 303 (33 S. E. Rep. 363).

**Sec. 300. Suits by—Lands in a foreign state.** The administrator of a decedent, and not his heirs, has the right to sue to recover the purchase money on land sold by the decedent. *Rockford v. Rockford*, Ky. (56 S. W. Rep. 992). The fact that the statutes of the state in which an administrator is appointed gives him the right of possession of the lands of the intestate not exempted, and the right to the rents, issues and profits thereof, for the purpose of administration, does not give him such an interest in the lands of his intestate in another state as will authorize him to sue to redeem from a mortgage thereon by setting off against the mortgage debt waste committed by the mortgagee in possession after the death of the intestate, or to recover damage for waste or trespass on such lands. *Price v. Ward*, 25 Nev. 203 (58 Pac. Rep. 849; 46 L. R. A. 459). The court say: "Discussing the power of administrators, the supreme court

of Iowa uses the following language: 'The administrator appointed in this state derives his powers from the statutes of this state. He succeeds to none of the powers or rights of the Pennsylvania administrator. His appointment empowers him to collect such assets of the estate as may be found in this state, and he may make such disposition of them as is directed by the laws of this state; and he is not answerable for his conduct either to the foreign administrator or to the power from which his authority is derived, but is independent of both. There is privity neither in law nor estate between them, and there is no general principle of law under which it can be held that a judgment against the one is binding upon the others.' *Creswell v. Slack*, 68 Ia. 113 (26 N. W. Rep. 42). The supreme court of the United States, in *Johnson v. Powers*, 139 U. S. 160 (11 Sup. Ct. Rep. 526), discussing the same question, quotes with approval from the opinion of Mr. Justice Grier, in *Stacy v. Thrasher*, 6 How. 58, in which he uses the following language: 'The administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situate, but coming into such possession by succession to the intestate, and incumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary has jurisdiction.' *Johnson v. Powers*, 139 U. S. 160 (11 Sup. Ct. Rep. 526). The following authorities hold to the same effect: 1 *Woerner, Adm'n*, § 158; 8 *Am. & Eng. Enc. Law* (1st Ed.) 427; *Taylor v. Barron*, 35 N. H. 496; *Deery v. Cray*, 5 Wall. 803; *Braithwaite v. Harvey*, 14 Mont. 208 (36 Pac. Rep. 39; 43 Am. St. Rep. 625); *State v. Fulton*, Tenn. (49 S. W. Rep. 297)."

**Sec. 301. Sales to pay debts.** A mortgagor's equity of redemption may be sold by his administrator to pay debts. *Rainey v. McQueen*, 121 Ala. 191 (25 So. Rep. 920). One who purchases the lands of a decedent pending the settlement of his estate, under a contract with the administrator and heirs, takes subject to the rights of creditors of the estate to have the lands sold to pay their claims, and, as against them, he cannot set up a claim for improvements as a first lien on the proceeds of the sale. *Moore v. Moore*, 155 Ind. 261

(57 N. E. Rep. 242). After the title to the real estate of a decedent has become vested in his heirs the legislature cannot empower his administrator to sell the land for purposes not authorized at the time the title vested, and to which it was not subject when it vested. Cal. Code Civ. Proc., §§ 1537, 1538, as amended by Stat. 1893, p. 212, construed and applied. In *re Packer's Estate*, 125 Cal. 396 (58 Pac. Rep. 59; 73 Am. St. Rep. 58). Under Ga. Civ. Code, §§ 3457, 3458, an administrator first must recover possession before he can sell the real estate of his intestate which is held adversely by his heirs or third persons claiming under them. *Davitt v. Southern Ry. Co.*, 108 Ga. 665 (34 S. E. Rep. 327).

**Sec. 302. Sales to pay debts—Parties, pleading and practice.** Cal. Code Civ. Proc., § 1537 construed and applied—sufficiency of petition to sell real property to pay debts. In *re Heydenfeldt's Estate*, 127 Cal. 456 (59 Pac. Rep. 839). The petition must correctly describe the land and the interest therein which the administrator seeks to sell. *Rainey v. McQueen*, 121 Ala. 191 (25 So. Rep. 920). Cal. Code Civ. Proc., §§ 1537-1539 construed and applied—petition for order to sell real estate and pay debts—order to show cause and service of order. *Campbell v. Drais*, 125 Cal. 253 (57 Pac. Rep. 994). The fee simple interest which the statute of Indiana gives to a surviving second or subsequent childless wife, in one-third of her deceased husband's lands, is not subject to a sale by his administrator to make assets generally, and neither she nor his children by a previous marriage, in whom the statute vests the title to such interest after her death, are necessary parties to such proceedings. *Bell v. Shaffer*, 154 Ind. 413 (56 N. E. Rep. 217). As to jurisdiction of orphans' court in Pennsylvania to sell lands of decedent on petition of executor, see *Freker v. Berg*, 193 Pa. St. 442 (44 Atl. Rep. 580). Construing a statute (Mo. Gen. Stat. 1865, p. 498, § 25) requiring that a notice to show cause why a decedent's land should not be sold to pay debts shall be published four weeks before the term of court at which the order of sale is to be made, requires the first publication to be made at least twenty-eight days prior to the first day of the term, and a sale made on a notice the first publication of which is made less than twenty-eight days before the beginning of the term is void, although it appeared in four issues of a weekly news-



paper before said day. *Young v. Downey*, 150 Mo. 317 (51 S. W. Rep. 751). Cal. Code Civ. Proc., § 1718 construed and applied—appointment of guardian ad litem. *Campbell v. Drais*, 125 Cal. 253 (57 Pac. Rep. 994). A grantee in a voluntary conveyance of a tract of land executed by his deceased grantor which the executor of the latter seeks to set aside and sell the land to pay debts, may show that the decedent executed similar conveyances of other lands to other parties, and have his indebtedness charged ratably against all of them. *Kaufman v. Elder*, 154 Ind. 157 (56 N. E. Rep. 215). Where, in a proceeding to sell the land of a deceased husband to pay his debts, his widow files a cross complaint seeking to quiet title to a part of the land which she claims as her own, the court, under the issue thus presented, may decree her to be the owner of the land subject to her husband's debts, and order the sale accordingly. *Watkins v. Lewis*, 153 Ind. 648 (55 N. E. Rep. 83). A judgment in proceedings to sell real estate of a decedent is not binding upon the prior vendees of an heir of the decedent who are not made parties to the proceedings. *Pritchard v. Smith*, Ky. (54 S. W. Rep. 717; 21 Ky. Law Rep. 1197). A decree ordering a sale to pay debts of lands alleged to belong to a decedent is conclusive as to his ownership of the land, against persons made parties thereto as his heirs, even as to a claim subsequently asserted by them as heirs of another. *Armstrong v. Hufty*, 156 Ind. 606 (55 N. E. Rep. 443). The necessity of appraisal of lands sold to pay debts as required by Ky. Stat., §§ 2362-2364, is not dispensed with by the fact that persons having a joint interest in the land with the decedent join in the action and ask that the entire land be sold. *Vivion's Adm'r v. Vivion*, Ky. (50 S. W. Rep. 984; 21 Ky. Law Rep. 103). Where it clearly appears from the price obtained and the understanding of the purchasers that an administrator's sale of incumbered property in fact was made free and clear of incumbrances, the court properly first may apply the proceeds in payment of the incumbrances, and, by nunc pro tunc order, amend the order of sale so as to authorize a sale free from incumbrances. N. J. Pub. Laws 1881, p. 141, construed and applied—sale of incumbered land free from incumbrance. *In re Voorhees*, 57 N. J. Eq. 291 (42 Atl. Rep. 567). Cal. Code Civ. Proc., § 1552 construed and applied—offer of advanced bid—discretion of court to accept or order a new sale. *In re Griffith's Estate*,

127 Cal. 543 (59 Pac. Rep. 988). Where a probate court has made an allowance for family support covering a period of several years and ordered a sale of real estate to pay it, a court of equity may direct the application of the proceeds first to the payment of a mortgage executed by the executrix on her interest in the real estate to secure money borrowed by her and used for the support of the family in lieu of the family allowance. *Curtis v. Schell*, 129 Cal. 208 (61 Pac. Rep. 951; 79 Am. St. Rep. 107).

**Sec. 303. Title and rights of purchaser at administrator's sale.** The rule of caveat emptor applies to a purchaser at an administrator's sale against his setting up a deficiency in quantity. *Pringle v. Rogers*, 193 Pa. St. 94 (44 Atl. Rep. 275). He does not take subject to the rights of third persons in the land resting on an executed parol agreement, where he has no notice of them. *Blankenship v. Whaley*, 124 Cal. 300 (57 Pac. Rep. 79). The court say: "At such a sale the maxim caveat emptor is held to apply; but, while the purchaser at such a sale is not warranted in his title, and is chargeable with knowledge and notice of that of which, by the exercise of due diligence, he could have acquired knowledge, he is still protected by the recording acts; and secret defects in a title apparently good are, as to him, no defects at all. *Love v. Berry*, 22 Tex. 371; *Banks v. Ammon*, 27 Pa. St. 172." A purchaser at an administrator's sale of a deceased husband's real estate takes subject to his widow's right to dower, where she has not released such right in the manner provided in the statute or by an estoppel upon which the purchaser relied. *Starr v. Newman*, 107 Ga. 395 (33 S. E. Rep. 427).

**Sec. 304. Validity of sales—Setting aside.** An administrator's sale is void, where, in all the proceedings, the description of the land purporting to be given by government subdivisions, the wrong range was given. *Hanson v. Ingwaldson*, 77 Minn. 533 (80 N. W. Rep. 702; 77 Am. St. Rep. 692). A delay of seven years after the entry of an order of sale before making the sale does not affect the validity of the sale subsequently made, Ill. Rev. Stat., ch. 22, § 45; ch. 77, § 1, requiring execution to issue on any judgment or decree in chancery within seven years having no application to a sale by an executor or adminis-

trator. *Kipping v. Demint*, 184 Ill. 165 (56 N. E. Rep. 330; 75 Am. St. Rep. 164). An administrator's sale of real estate will not be set aside because the auctioneer who cried the property for sale, on request of the administrator, cried a specific sum as a bid on the land for the widow of the intestate, who was not present and who became the purchaser on account of no higher bid being made, it not appearing that the auctioneer had any authority to bid for the widow any other or different sum. *James v. Kelley*, 107 Ga. 446 (33 S. E. Rep. 425; 73 Am. St. Rep. 135). Where all the proceedings upon which an administrator's sale is founded clearly describe lands which the decedent never owned, and no other, the sale is void, although the administrator's deed describes the proper lands; and such a sale cannot be validated by an order of the court making it, made years afterward, correcting the records in the case so as to describe the land of which the intestate died seized. *Hanson v. Ingwaldson*, 77 Minn. 533 (80 N. W. Rep. 702; 77 Am. St. Rep. 692). The sale of the whole of a lot under a decree directing a sale of two-thirds of it, which was all the court was authorized to sell, cannot be validated by a subsequent filing of an amended petition showing the necessity of selling all of the property and the entry of an order accordingly to be treated as of the date of the original petition. *Bell v. Shaffer*, 154 Ind. 413 (56 N. E. Rep. 217). Cal. Code Civ. Proc., § 1573, requiring actions to set aside an administrator's sale of real estate to be commenced within three years after the final account, does not bar an action by children of the decedent brought after that time to quiet their title to the undivided interest in the lands of their decedent sold at a void sale, as against the purchaser and those claiming under him who had notice of their rights; nor are they estopped from maintaining an action on account of their retention of money they received from the administrator's sale. *Campbell v. Drais*, 125 Cal. 253 (57 Pac. Rep. 994).

**Sec. 305. Collateral attack upon sales and conveyances.** A decree ordering or confirming a sale of a decedent's real estate to pay debts is not subject to collateral attack as to matters within the jurisdiction of the court. *Watkins v. Lewis*, 153 Ind. 648 (55 N. E. Rep. 83); *Covington v. Chamblin*, 156 Mo. 574 (57 S. W. Rep. 728). In case of a collateral attack upon proceedings to sell land to pay debts it will be

presumed that all necessary steps to bring the infant heirs of the decedent before the court were taken. *Sorrell v. Samuels*, Ky. (49 S. W. Rep. 762; 20 Ky. Law Rep. 1498). Confirmation of a probate sale by the court ordering it cures defects in the notice of the sale and an irregularity on the part of the officer in making the sale at a place other than that advertised, as against collateral attack. *Thompson v. Burge*, 60 Kan. 549 (57 Pac. Rep. 110; 72 Am. St. Rep. 369). Upon a collateral attack after a long lapse of time a court of general jurisdiction will be presumed to have acquired jurisdiction to render the judgment or decree it pronounces directing an administrator's sale of real estate, although the decree does not recite the jurisdictional facts. *Cassell v. Joseph*, 184 Ill. 378 (56 N. E. Rep. 413); *Robb v. Howell*, 180 Ill. 177 (54 N. E. Rep. 324).

**Sec. 306. Purchase by executor or administrator at his own sale.** An administrator's sale of land is not invalidated on the ground of his having an interest in the purchase of the land at the sale by reason of the fact that a firm of which he is a member has a claim against the estate. *Griffith v. Maxfield*, 66 Ark. 513 (51 S. W. Rep. 832). A purchase, by an executor, of property of the estate he represents, at a sale under an execution issued on a judgment against him as executor, is voidable at the instance of the legatees under the will, provided they institute proceedings to avoid the sale within a reasonable time after the fact of such purchase becomes known to them, or could have been discovered by the exercise of ordinary diligence. Ga. Civ. Code, §§ 4030, 4031, applied. *Word v. Davis*, 107 Ga. 780 (33 S. E. Rep. 691).

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## FENCES

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### EPITOME OF CASES

**Sec. 307. Partition fences.** When a partition fence is torn down, except for the purpose of rebuilding, the materials therein become personal property, and the owner of them may maintain replevin for their possession. *Moore v. Coombs*, 24

Ind. App. 464 (56 N. E. Rep. 35). Ia. Code 1873, § 3224; Code, § 4110 construed and applied—proceedings by fence viewers ordering building of division fence and assessing costs—appeal. *Miles v. Tomlinson*, 110 Ia. 322 (81 N. W. Rep. 587). Mass. Pub. Stat., ch. 36, § 5, construed and applied—proceedings to determine controversies over partition fences—service of notice—evidence. *Day v. Dolan*, 174 Mass. 524 (55 N. E. Rep. 384). How. Ann, Mich. Stat., ch. 21 construed and applied—proceedings to procure the construction of a partition fence. *Scofield v. Haire*, 122 Mich. 265 (80 N. W. Rep. 1091).

**Sec. 308. Fencings railroads—Constitutionality of statute subjecting railroads failing to fence to double damage.** A statute (Mo. Rev. Stat. 1889, § 2611) authorizing the recovery of double damages against railroad companies sustained by reason of stock straying upon the right of way or entering adjoining lands therefrom in consequence of insufficient fences, is constitutional. *Kingsbury v. Missouri, K. & T. Ry. Co.*, 156 Mo. 379 (57 S. W. Rep. 547). See opinion for further construction of this statute; also, *Boggs v. Missouri, K. & T. Ry. Co.*, 156 Mo. 389 (57 S. W. Rep. 550); *Darby v. Missouri, K. & T. Ry. Co.*, 156 Mo. 391 (57 S. W. Rep. 550). Upon the constitutionality of this statute the court, in the first case cited, say: "The constitutionality of this section of the statute, commonly known as the 'Double-Damage Act,' has been often questioned, but has been invariably sustained by this court in a long and unbroken line of decisions, and by the supreme court of the United States in all the cases that have come before that tribunal involving the question, or in which it was considered. *Gorman v. Railroad Co.*, 26 Mo. 441 (72 Am. Dec. 220); *Trice v. Railroad Co.*, 49 Mo. 438; *Barnett v. Railroad Co.*, 68 Mo. 56; *Cummings v. Railway Co.*, 70 Mo. 570; *Spealman v. Railway Co.*, 71 Mo. 434; *Humes v. Railway Co.*, 82 Mo. 221 (52 Am. Rep. 269); *Phillips v. Railway Co.*, 86 Mo. 540; *Hines v. Railway Co.*, 86 Mo. 629; *Hamilton v. Railway Co.*, 87 Mo. 85; *Perkins v. Railway Co.*, 103 Mo. 52 (15 S. W. Rep. 320; 11 L. R. A. 426); *Briggs v. Railway Co.*, 111 Mo. 168 (20 S. W. Rep. 32); *Railway Co. v. Humes*, 115 U. S. 512 (6 Sup. Ct. Rep. 110; 29 L. Ed. 463); *Railway Co. v. Terry*, 115 U. S. 523 (6 Sup. Ct. Rep.

114; 29 L. Ed. 463); *Railroad Co. v. Mathews*, 165 U. S. 17 (17 Sup. Ct. Rep. 243; 41 L. Ed. 611)."

**Sec. 309. Fencing railroads—Statutes construed.** Ind. Rev. Stat. 1894, §§ 5323, 5324 (Rev. Stat. 1901, §§ 5323, 5324) construed and applied—recovery of cost of fencing railroad by landowner—complaint—notice. *Chicago & S. E. Ry. Co. v. Vert*, 24 Ind. App. 78 (56 N. E. Rep. 139). Construing and applying Ky. Stat., § 1796, providing that the statutory provisions requiring a railroad company to erect one-half the division fence between its right of way and adjoining lands "shall not apply to any land where the owner or his grantor has received compensation for fencing the same," it is held that where the deed of an owner or his grantor conveying a right of way makes no reference to fencing it will not be presumed that they have received compensation therefor. *Owensboro & N. Ry. Co. v. Townsend*, Ky. (53 S. W. Rep. 662; 21 Ky. Law Rep. 997). Tex. Rev. Stat., §§ 4427-4434 construed and applied—fencing railroads—"openings" required. *Missouri, K. & T. Ry. Co. v. Hanacek*, 93 Tex. 446 (55 S. W. Rep. 1117). Wis. Rev. Stat., § 1810 construed and applied—exception of depot grounds from operation of the statute. *Cole v. Duluth, S. S. & A. Ry. Co.*, 104 Wis. 460 (80 N. W. Rep. 736).

**Sec. 310. Fencing railroads—Farm crossings—Cattle guards, etc.** A railroad company constructing a gate at a farm crossing safe and ample for all ordinary purposes is not charged with the duty of obstructing an opening under the gate occasioned by the wearing down of the ground by the passage of stock and teams, so as to prevent the access of children to its tracks by crawling under the gate. *Friend v. Chicago & N. W. Ry. Co.*, 104 Wis. 663 (80 N. W. Rep. 934). A farm crossing over a railroad right of way is not a private way, within the meaning of Tenn. Laws 1879, ch. 183, and Code, § 4913, subd. 4, making it a criminal offense to obstruct such a way. *Greer v. Nashville, C. & St. L. Ry.*, 104 Tenn. 242 (56 S. W. Rep. 850). A landowner's statutory right to a crossing over a railroad is not lost by his failure to stipulate for the construction of such crossing in a grant by him of the right of way. *Kirk v. Kansas City S. & G. Ry. Co.*, 51 La. Ann. 664 (25 So. Rep. 463). A statute (Ia. Code, § 3004),

requiring a railroad company to furnish a land owner having land on both sides of its track a suitable crossing at such place as may be designated by the owner, does not deprive the company of the power to change the location of the crossing, for the purpose of avoiding danger of fire and of accident to passing trains, although the crossing has been used for the prescriptive period. See opinion as to rights and remedies of land owner in such a case. *Schrimer v. Chicago, M. & St. P. Ry. Co.*, Ia. (82 N. W. Rep. 916). *Sand. & H. Ark. Dig.*, §§ 5890, 6238, 6239 construed and applied—duty of railroads to construct cattle guards—notice by landowner upon failure to do so. *Kansas City, P. & G. Ry. Co. v. Lowther*, Ark. (57 S. W. Rep. 518). It is negligence for a railroad company to permit a cattle guard to be overgrown with weeds, grass and other vegetation so as to prevent its being seen by live stock. See opinion as to what constitutes a "cattle guard" within the meaning of Ky. Stat., § 1793. *Louisville, H. & St. L. Ry. v. Beauchamp*, Ky. (55 S. W. Rep. 716; 21 Ky. Law Rep. 1476). Particular facts held to constitute a compliance with the statute of Mississippi in regard to the construction of a crossing over a railroad for a plantation road. *Yazoo & M. V. R. Co. v. Anderson*, 76 Miss. 582 (25 So. Rep. 295). *Tex. Rev. Stat.* 1895, §§ 4427-4433, construed and applied—crossings and openings in fences. *Missouri, K. & Y. Ry. Co. v. Chenault*, 92 Tex. 501 (49 S. W. Rep. 1035).

**Sec. 311. Gates in railroad fences—Duty to keep closed.** It is the duty of a landowner for whose benefit and convenience gates are constructed and placed in a railroad right of way fence at a farm crossing upon the land of such owner to keep such gates closed, and the railroad owes no duty to him or to those in privity with him to keep such gates closed; but its full duty is performed if the gates are kept in reasonably good repair. *Swanson v. Chicago, M. & St. Paul Ry. Co.*, 79 Minn. 398 (82 N. W. Rep. 670; 49 L. R. A. 625; see pp. 625-639 for exhaustive note on "Duty to keep gates in railroad fences closed"). The doctrine of this case is adhered to in a later opinion by the same court, but in applying it to a case where the crossing over a railroad leads from a highway to private lands on the opposite side of the track, it is held that, as between the company and the other parties interested

in maintaining the gate, the obligation to keep the same properly closed is mutual, and demands the exercise of ordinary care from each. *Mooers v. Northern Pac. Ry. Co.*, 80 Minn. 24 (82 N. W. Rep. 1085). In the first case the court say: "The plaintiff rests his case upon the square proposition that it was the duty of defendant to keep the gates closed as a part of his duty to 'maintain' the fence. In this we cannot concur. No case involving the precise point has ever been before this court, and we are confronted with the question for the first time. It has been before the court of last resort in other states, and the trend of the later decisions relieves the company of the responsibility as to the landowner for whose benefit the gates are placed in the fence, and casts the duty of keeping the gates shut upon the latter. The company's duty is fully performed if it constructs a suitable gate, and keeps and maintains it in reasonably good repair. *Adams v. Railroad Co.*, 46 Kan. 161 (26 Pac. Rep. 439); *Railroad Co. v. Glenn*, 8 Tex. App. 301 (30 S. W. Rep. 845); *Bond v. Railroad Co.*, 100 Ind. 301; *Eames v. Railroad Co.*, 96 Mass. 151; *Diamond Brick Co. v. New York Cent. & H. R. R. Co.*, 58 Hun, 396 (12 N. Y. Sup. 22); *Megrue v. Lennox*, 59 O. St. 479 (52 N. E. Rep. 1022); *Railroad Co. v. Robinson*, 17 Tex. Civ. App. 400 (43 S. W. Rep. 76); *Box v. Railroad Co.*, 58 Mo. App. 359. We believe this rule to be consistent, and in accord with the plainest principles of equity and justice, and we adopt it as the law of this state. It can work no hardship to the landowner. He and his servants can, without the least inconvenience, keep the gates closed, and the railroad company should not be burdened with responsibility for their neglect to do so. To impose the duty upon the company, at least as respects the landowner, for whose benefit the gates are erected, and those in privity with him, would be, it seems to us, extremely unreasonable and unjust. It would be impracticable for the company to perform the duty, if imposed upon it, without keeping an employee constantly on the watch to guard and protect the landowner from his own neglect. And a construction of the law in harmony with appellant's contention would result in relieving the landowner of all responsibility with respect to keeping the gates closed, and cast the entire burden on the company. We cannot concur in this view of the law, or adopt the theory of appellant's counsel. Our statutes not only require the railroad company to construct a fence,



but to maintain the same after it has been constructed; and counsel insists that a failure to keep such gates closed is a failure to maintain the fence. The contention is untenable. If the gates are kept in a reasonably good condition of repair, they are sufficiently 'maintained,' within the meaning of the statutes. We do not wish to be understood as holding that this rule is applicable to any person or persons other than the land owner for whose convenience and benefit the gates are placed in the fence, and those in privity with him. The question of liability of the company as to third persons who suffer damage by reason of such gates being left open is not decided."

**Sec. 312. Miscellaneous notes.** The malicious erection of a high fence by a landowner on his own lot which obstructs the view of an adjoining owner and cuts off light and air from his premises does not give him a right of action. *Saddler v. Alexander*, Ky. (56 S. W. Rep. 518; 21 Ky. Law Rep. 1835). Va. Laws 1893-94, p. 941; Code 1887, § 2038; Laws 1897-98, p. 651 construed and applied—as to what constitutes a lawful fence. *Poindexter v. May*, 98 Va. 143 (34 S. E. Rep. 971; 47 L. R. A. 588).

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## FIXTURES

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### TAYLOR v. NEWCOMB.

(123 Mich. 637.)

**Landlord and tenant—Right to manure.** A grantor of a farm who after his conveyance of the same, remains in possession thereof under a lease from his grantee, is entitled to manure subsequently accumulating thereon from his feeding to his stock fodder, hay and straw stored by him on the farm previous to its sale.

MONTGOMERY, C. J.

**Sec. 313. Statement of the case.** On the 13th of November, 1894, the defendant Newcomb conveyed to complainant a farm consisting of 80 acres in the township of Pierson, Montcalm county. On the same day a lease in the following

words was given back to Newcomb: "It is here contracted and agreed by and between Fred F. Taylor, of the first part, and Solomon B. Newcomb, of the second part, that in consideration of one dollar and other valuable consideration, the receipt whereof is hereby confessed and acknowledged, that the said first party leases to the second party the use of the buildings, well, windmill, yard and barnyard on the north  $\frac{1}{2}$  of northeast  $\frac{1}{4}$ , section 28, town 11 north, range 10 west, of Michigan, from the date hereof to the first day of April, A. D. 1895, and all the pasture on said land until the winter of 1894-5 sets in." On the date of this transaction defendant Newcomb had stored in the barn a quantity of hay, cornstalks and straw. During the winter following he made a quantity of manure by feeding such fodder to his stock, the manure remaining and being housed in the barn and on the premises. In June, 1895, defendant Newcomb sold this manure to defendant Banfield, and the present bill is filed to enjoin its removal from the premises. From a decree dismissing the bill, complainant appeals.

**Sec. 314. Landlord and tenant—Right to manure.**

The great weight of authority in this country sustains the rule that, as between landlord and tenant, manure made on the farm by the cattle of the lessee, which is made from the products of the farm, and as a result of the consumption of its produce thereon, becomes a part of the realty. Tyler, Fixt. 356; 1 Washb. Real Prop. 13; Kittredge v. Woods, 3 N. H. 593; Lassell v. Reed, 6 Greenl. 222; Middlebrook v. Corwin, 15 Wend. 169; Daniels v. Pond, 21 Pick. 371 (32 Am. Dec. 269). The rules as stated in Tyler on Fixtures is as follows: "The rule of law may, therefore, be safely declared that manure made upon a farm, or gathered in therefrom, and produced mainly from the pasturing of sheep, cattle and horses on its succulent vegetables and grasses, or other products of the farm, in the absence of any stipulation or custom to the contrary, belongs to the farm, and cannot be legally removed therefrom by the tenant. But if the manure were not produced directly or indirectly from the land, and were in no sense the product of agricultural demised premises,—such as accumulates in livery stables and the like,—it is no part of the realty, and may be removed by the tenant at the close of his term." Defendant's counsel does not controvert this general rule, but con-

tends that in this case the manure never became a part of the realty, for the reason that on the sale of the land to complainant the straw, hay and cornstalks remained the property of defendant, to do with as he pleased; and that he might have removed them from the premises without let or hindrance; that the manure was not produced, directly or indirectly, from the land while the defendant was tenant of complainant. The circuit judge adopted this view, and we think he is sustained by the logic of the cases. It is held in numerous cases that, where the manure is made, not from the products of the farm, but substantially like making it in a livery stable, the tenant is entitled to it. *Needham v. Allison*, 24 N. H. 355; *Fletcher v. Herring*, 112 Mass. 382. In the case of *Pickering v. Moore*, 67 N. H. 533 (32 Atl. Rep. 828; 31 L. R. A. 698; 68 Am. St. Rep. 695), it was said by Carpenter, J.: "No rule of good husbandry requires the tenant to buy hay or other fodder for consumption on the farm. If, in addition to the stock maintainable from its products, he keeps cattle for hire, and feeds them upon fodder produced by purchase or raised by him on other lands, the landlord has no more legal or equitable interest in the manure so produced than he has in the fodder before it is consumed. It is not made in the ordinary course of husbandry; it is produced in a manner substantially like making it in a livery stable." In the present case plaintiff had no interest in the fodder which was fed out by defendant. Her rights in it were not in any way different than they would have been in fodder purchased by the tenant. When the manure was made, the rights of the defendant were those of a tenant in the buildings only. His rights to pasturage terminated when winter set in. The manure was produced substantially like making it in a livery stable. See, further, *Gallagher v. Shipley*, 24 Md. 418 (87 Am. Dec. 611). It should be stated that the record shows that there was no manure on the premises when sold. The rights of a purchaser to the manure accumulated on agricultural lands is, therefore, in no way involved. Decree is affirmed, with costs. The other justices occurred.

#### Sec. 315. Title and right to manure.

Manure accumulated in and about the buildings on a parcel of land sold at partition sale subject to the rights of the lessee of the entire tract belongs to the purchaser of such parcel, who is entitled to an injunction restraining the lessee from distributing the manure over other parcels, where the lease terminates before another cropping year.

*Elting v. Palen*, (Sup. Ct.) 38 N. Y. S. R. 93 (14 N. Y. Supp. 607). A conveyance of a small lot off of a farm does not carry manure which had been hauled from the barnyard and piled thereon. *Collier v. Jenks*, 19 R. I. 137 (32 Atl. Rep. 208; 61 Am. St. Rep. 741). The court recognizes the general rule that a deed of a farm ordinarily passes manure thereon, but say: "The rule is one of policy, designed to promote the interests of agriculture. We see no reason for its application when the sale is, not of the farm, but only of a small parcel of the land off the farm, on which the manure happens to be piled. 'Cestante ratione, lex ipsa cessat.' There is nothing in the nature of manure, prior to its actual incorporation with the soil, which makes it necessary to regard it as a part of the realty. It may be sold by the owner of a farm separately from the land. Such a sale amounts to a severance of it from the land, and constitutes it personal estate—*French v. Freeman*, 43 Vt. 94,—or it may be the subject of an oral reservation prior to or contemporaneous with the conveyance of the land, and thereby becomes personal estate—*Strong v. Doyle*, 110 Mass. 92. Manure made in livery stables, or in barns not connected with farms, or otherwise than in the usual course of husbandry, forms no part of the realty on which it may be piled, but is regarded as personal estate. *Needham v. Allison*, 4 Fost. (N. H.) 355; *Daniels v. Pond*, 21 Pick. 367 (32 Am. Dec. 269); *Lassell v. Reed*, 6 Greenl. 222; *Parsons v. Camp*, 11 Conn. 525. The conveyance to the plaintiff having been not of the farm, but only of a lot of seven-eighths of an acre, we are of the opinion that the manure did not form a part of the land conveyed because it happened to be piled on it at the time of the conveyance, and, hence, that the court below erred in awarding the value of the manure to the plaintiff." For exhaustive compilation of authorities on the rights of landlord and tenant in respect to manure on leased premises, see *Ballards' Law of Real Property*, Vol. IV, § 316; 31 L. R. A. 698-700.

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#### EPITOME OF CASES.

**Sec. 316. What constitutes a fixture—Particular cases.** For an enumeration of the general requisites of a fixture, see *Oliver v. Lansing*, 59 Neb. 219 (80 N. W. Rep. 829). The intention with which personal property is attached to real estate, and not the character of its physical connection, determines whether it is a fixture. *Wick v. Bredin*, 189 Pa. St. 83 (42 Atl. Rep. 17). Whether a building situate upon land is real or personal property is a question of law, to be

determined from the facts as to the character of the building, its relations to the soil it occupies, and the intention of its owners or claimants; and, in the absence of a sufficient showing to the contrary, the law will presume that a building located upon a tract of land is a part of the land it occupies, and is therefore real property. *Bridges v. Thomas*, 8 Okla. 620 (58 Pac. Rep. 955). A fence is not necessarily a fixture. *Bingham Co. Agric. Ass'n v. Rogers*, Ida. (59 Pac. Rep. 931). Construing and applying La. Rev. Civ. Code, §§ 460, 468, 469. it is held that chandeliers and brackets placed in a dwelling house by the owner thereof are not fixtures which pass to the purchaser of the property at sheriff's sale. *L'Hote v. Fulham*, 51 La. Ann. 780 (25 So. Rep. 655). Particular case in which a dynamo and appurtenant machinery in an electric light plant were held to be permanent fixtures. *Gunderson v. Swarthout*, 104 Wis. 186 (80 N. W. Rep. 465; 76 Am. St. Rep. 860). For particular case in which heavy machinery for the manufacture of brick, placed upon real estate by the vendee thereof, was held to be a fixture and subject to his mortgage for the purchase price, see *Fisk v. People's Nat. Bank*, 14 Colo. App. 21 (59 Pac. Rep. 63). For particular case in which a fence enclosing public lands was held not to be a fixture, see *Bingham Co. Agric. Ass'n v. Rogers*, Ida. (59 Pac. Rep. 931).

**Sec. 317. Personal property attached to real estate—**  
**Effect of contract reserving title or fixing character of the property or chattel mortgage to secure purchase price.**  
When things personal in their character are about to be annexed to realty, parties may, in anticipation of such annexation, by express agreement provide that such chattels shall retain their character and status as personalty; and if they do not, by their annexation, lose their distinctive identity, and thereby become so essentially a part of the realty that their removal will materially injure or destroy the realty, or destroy or unnecessarily impair the value of the chattels, their original character will be preserved by the agreement, as between the parties to the agreement and third parties having notice of it. *Hershberger v. Johnson*, 37 Or. 109 (60 Pac. Rep. 838). An electric generator, weighing 15 tons, and a switch board for the distribution of the electric current, so placed by a company in a building occupied by it as a car barn and power

house that they can be removed without injury to the building, do not constitute fixtures which pass under a prior mortgage of the real estate, as against a vendor of such machinery claiming title under a conditional sale. *General Elec. Co. v. Transit Equip. Co.*, 57 N. J. Eq. 460 (42 Atl. Rep. 101). The case of *Wickes Bros. v. Hill*, 115 Mich. 333, epitomized at length in *Ballards' Law Real Prop.*, Vol. VI, § 356, is followed in *Watson v. Alberts*, 120 Mich. 508 (79 N. W. Rep. 1048). If machinery under mortgage is placed in a mill already mortgaged, it becomes subject to the realty mortgage, to the extent that is necessary to keep the security thereof unimpaired, so far as the personalty mortgage is concerned. If such machinery is mortgaged to its full value, and it will not damage the mill property by its removal, the mortgagee or purchaser may remove the same; otherwise, he must make good the damage caused by such removal. *Hurxthal's Ex'x v. Hurxthal's Heirs*, 45 W. Va. 584 (32 S. E. Rep. 237). The court say: "The authorities on this subject widely differ. The true equitable rule is stated in the case of *Binkley v. Forkner*, 117 Ind. 176 (19 N. E. Rep. 753; 3 L. R. A. 33), to-wit: 'A chattel mortgage is effectual to preserve the character of the mortgaged chattels, as against a mortgage on the realty executed prior thereto, if the chattels can be removed without injury or impairing the value of the real estate, or the buildings thereon. If the detachment would occasion some diminution on the value of the realty, as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case.' This rule is said to be firmly established in the interest of trade. That the realty mortgagee's security is kept whole is all that he can ask, as against the property of third parties. When the mortgaged personal property is attached to the realty, the mortgagor has only an equity redemption therein, to which the mortgage on the realty at once attaches. *Campbell v. Roddy*, 44 N. J. Eq. 244 (14 Atl. Rep. 279); *Eaves v. Estes*, 10 Kan. 314 (15 Am. Rep. 345); *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tift v. Horton*, 53 N. Y. 377 (13 Am. Rep. 537); *Sword v. Low*, 122 Ill. 487 (13 N. E. Rep. 826)." In Louisiana it is held that the unpaid vendor of machinery has a right to seize and sell the machinery, although it may have been attached to, and has become a part of real estate which is mortgaged. Mon-

roe Bldg. L. Ass'n v. Johnston, 51 La. Ann. 470 (25 So. Rep. 383).

**Sec. 318 Right to fixtures—Mortgagor and mortgagee.** Curtains, window screens, screen doors, a table or sideboard, a hot-water tank, a wind mill, globes for electric and gas lights, and gas and electric light fixtures, affixed to mortgaged premises, are not property which follows the realty. *Hall v. Law Guarantee & T. Soc.*, 22 Wash. 305 (60 Pac. Rep. 643; 79 Am. St. Rep. 935). Construing Cal. Civ Code, §§ 658, 660, providing that real property consists of land and that which is affixed to it, and that a thing is deemed to be fixed to land when it is permanently resting upon it, as in case of buildings, it is held that a warehouse one hundred feet by forty feet, with concrete foundation, placed on land by a lessee thereof, for a term of years whose lease gave him the privilege of removing it, will be treated as real estate as between the holder of a mortgage on the lessee's interest in the land and a subsequent purchaser of the warehouse. *Commercial Bank v. Pritchard*, 126 Cal. 600 (59 Pac. Rep. 130). For particular case in which an apparatus for artificial refrigeration was held not to be a fixture as between mortgagor and mortgagee, see *Northwestern Mut. Life Ins. Co. v. George*, 77 Minn. 319 (79 N. W. Rep. 1028).

**Sec. 319. Right of tenant to remove fixtures.** Buildings erected by a tenant under an unrecorded agreement, giving him the right to remove them on the termination of his lease, pass with the land to a purchaser thereof at a foreclosure sale without notice of such agreement. *Union Cent. Life Ins. Co. v. Tillery*, 152 Mo. 421 (54 S. W. Rep. 220; 75 Am. St. Rep. 480). Trade fixtures for a store room, made in sections so they easily can be removed, and so placed in a building by a lessee, may be removed by him. *Roth v. Collins*, 109 Ia. 501 (80 N. W. Rep. 543). Chattels placed on real estate by a lessee thereof in such a manner that they otherwise would be treated as fixtures, under an agreement with the owner of the premises that the lessee may remove them, retain their character as personal property as against a prior mortgagee, it not appearing that their removal will in any manner injure his security. *Broadus v. Smith*, 121 Ala. 335 (26 So. Rep. 34; 77 Am. St. Rep. 61). Structures erected by a lessee on leased

premises in pursuance of an agreement in his lease to do so which formed a part of the consideration for the lease belong to the lessor, and cannot be removed by the lessee or his assigns. But the rule is otherwise as to structures erected for the better temporary use of the realty by the lessee, where they can be removed without injury thereto. *Tunis Lumber Co. v. R. G. Dennis Lumber Co.*, 97 Va. 682 (34 S. E. Rep. 613). A scenic railway erected by a lessee of premises leased for a summer resort, consisting of a pavilion with a series of undulating elevated tracks starting from and returning to it, with the requisite machinery, apparatus and cars to make flying trips for the amusement of its patrons, constitutes a trade fixture which he may remove during his term. *L. A. Thompson Scenic Ry. Co. v. Young*, 90 Md. 278 (44 Atl. Rep. 1024).

**Sec. 320. Right of tenant to remove fixtures—Effect of taking new lease or renewal of lease.** A lessee who fails to remove fixtures during the life of his lease and accepts a new lease in which he covenants to surrender the premises as they then were, and in which it is provided that all improvements put upon the premises shall belong to the lessor, thereby waived any right he might have had under his first lease to remove fixtures. *Geo. Bauernschmidt Brewing Co. v. McColgan*, 89 Md. 135 (42 Atl. Rep. 907). The same is true where the lease was silent as to the fixtures. *Stephens v. Ely*, 162 N. Y. 79 (56 N. E. Rep. 499). The rule that a lessee having a right under his lease to remove fixtures, who accepts a renewal or a new lease without reserving this right, thereby loses such right, will not be held to apply to the extent of preventing a lessee taking a new lease from a purchaser of the premises, which is silent as to his right to remove fixtures, from showing that the purchaser took the property subject to his right to remove his fixtures and that he recognized and agreed to respect such right when the lease was renewed. *Hertzberg v. Witte*, 22 Tex. Civ. App. 320 (54 S. W. Rep. 921). See opinion for review of authorities on this subject; also *Ballards' Law of Real Property*, Vol. VI, § 360.



# FORCIBLE ENTRY AND DETAINER

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## EPITOME OF CASES.

**Sec. 321.** As to what constitute forcible entry and detainer. The gravamen of the action of forcible entry and detainer is the unlawful and forcible entry upon, and detention of real property; and the action may be maintained by one who has been deprived of the possession of real property by an unlawful and forcible entry thereon, by a person having the absolute title and the present right of possession. *Tarpenning v. King*, 60 Neb. 213 (82 N. W. Rep. 621). Construing and applying Ala. Code, § 2126, providing that "a forcible entry and detainer is, where one, by force or strong hand, or by exciting fear or terror, enters upon and detains lands or tenements in the possession of another; as by breaking open doors, windows, or any other part of a house, whether any person be within or not," it is held that an entry by one upon a lot in the actual possession of another during the latter's absence and the removal therefrom of a wire fence, though "in a quiet and peaceful manner," and replacing it with another fence, is made by use of force. *Mallon v. Moog*, 121 Ala. 303 (25 So. Rep. 583). Sand. & H. Ark. Dig. § 3444 construed and applied—what constitutes unlawful detainer. *Winkler v. Massengill*, 66 Ark. 145 (49 S. W. Rep. 494). Under the statute of Illinois actual violence, amounting to a breach of the peace, is not necessary to constitute forcible entry and detainer; any entry is forcible, within the meaning of the law, that is made against the will of the occupant. *Hammond v. Doty*, 184 Ill. 246 (56 N. E. Rep. 371). Ind. Rev. Stat. 1894, § 7118 (Rev. Stat. 1901, § 7118), giving a right of damage against any person unlawfully detaining lands from the person having the right to possession thereof, does not apply where the relation between the landowner and the occupant is that of master and servant. *Heffelfinger v. Fulton*, 25 Ind. App. 33 (56 N. E. Rep. 688).

**Sec. 322. Who may maintain the action.** One in possession of a tract of land may maintain the action, although he actually does not reside upon the premises. *Hammond v. Doty*, 184 Ill. 246 (56 N. E. Rep. 371). Construing and applying 2 Bal. Ann. Wash. Codes & Stat., § 5527, making a tenant who continues in possession after the expiration of his term guilty of unlawful detainer, and § 4824, providing that "every action shall be prosecuted in the name of the real party in interest," it is held that the action may be maintained against such tenant by the lessee whose term follows immediately. *Capital Brewing Co. v. Crosbie*, 22 Wash. 269 (60 Pac. Rep. 652). Where a claim of title made by a defendant in an action for partition is upheld by a decree therein which authorizes the issuance of a writ of assistance to put him in possession, it is proper to dismiss an action for unlawful detainer commenced by him after he had filed his answer in the partition suit. *McAlexander v. Coopwood*, Miss. (25 So. Rep. 488).

**Sec. 323. Complaint—Defenses—Evidence.** Under Cal. Code Civ. Proc., § 1172, the plaintiff must allege that he was in actual possession of the premises at the time of the forcible entry, and it is not sufficient to allege that he "was in peaceable and undisturbed possession" thereof. *Knowles v. Crocker Estate Co.*, 125 Cal. 264 (57 Pac. Rep. 998). Under Neb. Code Civ. Proc. 1897, § 1023, a complaint which accurately describes the premises and distinctly charges an unlawful detention thereof by the defendant is sufficient. *Moore v. Parker*, 59 Neb. 29 (80 N. W. Rep. 43). Particular complaint in action for unlawful detainer against tenant holding over, held sufficient. *Odell v. Butterick*, 126 Cal. 551 (59 Pac. Rep. 133). In Mississippi an equitable defense is not available. *Home Mut. Bldg. & L. Ass'n v. Leonard*, 77 Miss. 39 (25 So. Rep. 351). The plaintiff must prove by a preponderance of the evidence that he was in the actual possession of the premises in controversy and at or about the time alleged in the complaint the defendant with force and violence entered upon the premises and ousted the plaintiff from such possession, and retained possession by force thereafter. *Hunt v. Hicks*, Ind. Ter. (54 S. W. Rep. 818). The duplicate receipt of a receiver of a United States land office is sufficient evidence of title to support the action. *Moore v. Parker*, 59 Neb. 29

(80 N. W. Rep. 43). For particular case in which the evidence was held not to sustain the complaint, see *Garner v. Bonham*, Ind. Ter. (49 S. W. Rep. 45). For cases determining particular questions as to the admissibility of evidence, see *Brown v. Woolsey*, 2 Ind. Ter. 329 (51 S. W. Rep. 965).

**Sec. 324. Practice—Statutes construed.** The action is possessory merely, and does not involve the title to the real estate, except as the title incidently may be offered in evidence to support the claim of right to possession. *McClain v. Jones*, 60 Kan. 639 (57 Pac. Rep. 500); *Hammond v. Doty*, 184 Ill. 246 (56 N. E. Rep. 371). Under Ala. Code, § 2135, the merits of the title cannot be inquired into in an action of unlawful detainer. *Howard v. Jones*, 123 Ala. 448 (26 So. Rep. 129). Ala. Code, §§ 2187-2189 construed and applied—removal of suit from justice to circuit court—trial. *Mallon v. Moog*, 121 Ala. 303 (25 So. Rep. 583). *Mansf. Ark Dig.*, §§ 3348-3351 (Ind. Ter. Ann. Stat. 1899, §§ 2282-2285) construed and applied—demand for possession. *Durie v. McLish*, 2 Ind. Ter. 610 (53 S. W. Rep. 437). Ia. Code, §§ 3425, 3438, 4211 construed and applied—jurisdiction of justice of the peace—direction of verdict by the court. *Herkimer v. Keeler*, 109 Ia. 680 (81 N. W. Rep. 178). Ia. Code, § 4208 construed and applied—action against tenant holding possession of premises after termination of his lease; § 4217 construed and applied—thirty days possession with knowledge of plaintiff as a bar to the action. *McClelland v. Wiggins*, 109 Ia. 673 (81 N. W. Rep. 156). Md. Code, art. 53, §§ 4-6 construed and applied—jurisdiction of justice of peace without aid of jury. *Roth v. State*, 89 Md. 524 (43 Atl. Rep. 769). 2 N. J. Gen. Stat., p. 1914 construed and applied—proceedings by landowner for removal of tenant—proof of jurisdictional facts. *State v. Maul*, 63 N. J. L. 153 (43 Atl. Rep. 434). Okla. Stat. 1893, § 2299 construed and applied—criminal prosecution for forcible entry or unlawful detainer—sufficiency of indictment. *Foust v. Territory*, 8 Okla. 541 (58 Pac. Rep. 728). S. Dak. Comp. Laws, §§ 6073, 6074 construed and applied—giving notice to quit to party in possession—filing with justice. *Northwestern Loan & Banking Co. v. Jonasen*, 12 S. Dak. 618 (82 N. W. Rep. 94). Utah Rev. Stat. 1898, § 3582, construed and applied—allegations and

proof required of plaintiff as to his title and right to possession and the giving of notice to surrender. *Holladay Coal Co. v. Kirker*, 20 Utah, 192 (57 Pac. Rep. 882). 2 Bal. Ann. Wash. Codes & Stat., §§ 5546, 5548 construed and applied—appeal—proceeding upon writ of restitution. *State v. Benson*, 21 Wash. 580 (59 Pac. Rep. 501). For cases determining particular questions of practice, see *Hunt v. Hicks*, Ind. Ter. (54 S. W. Rep. 818).

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## FRAUDULENT CONVEYANCES

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### EPITOME OF CASES.

#### Sec. 325. What constitutes a fraudulent conveyance.

A conveyance by a debtor to his sister in consideration of her agreement to support their parents, is fraudulent as to his creditors. *Brown v. Moore*, Ky. (52 S. W. Rep. 944; 21 Ky. Law Rep. 664). In order for a deed to be set aside on account of the grantor's intent to defraud creditors, there must be a liability chargeable against him at the time of its date. *Goldsmith v. Goldsmith*, 46 W. Va. 426 (33 S. E. Rep. 266). A grantee who takes a conveyance from a failing debtor, either with actual or constructive notice of his intent to defraud his creditors, takes subject to their claim, although he pays a valuable consideration. *Frank v. Zeigler*, 46 W. Va. 614 (33 S. E. Rep. 761). Vt. Stat., § 4965, avoiding a fraudulent conveyance "made or had to avoid a right, debt or duty," applies to a conveyance made to defeat the personal liability of a director in a corporation, created by a sale to it on the misrepresentation that it was legally organized. *Corey v. Morrill*, 71 Vt. 51 (42 Atl. Rep. 976). The fact that a grantee in a conveyance fraudulent as to creditors at the time of its execution remains in possession of the land and pays debts of the grantor in excess of its value, does not purge the transaction of its fraud. *Caldwell v. Walker*, 76 Miss. 879 (25 So. Rep. 929; 71 Am. St. Rep. 545). An assignment of a fraudulent

mortgage to secure a creditor of the mortgagor is valid without any consideration moving from the assignee to the assignor. *Longfellow v. Barnard*, 58 Neb. 612 (79 N. W. Rep. 255; 76 Am. St. Rep. 117). One who purchases from a grantee in a conveyance executed in fraud of creditors, with knowledge of the fraudulent character of the conveyance, takes subject to the right of the grantor's creditors to set it aside. *Joyce v. Perry*, 111 Ia. 567 (82 N. W. Rep. 941).

**Sec. 326. Conveyances to delay creditors.** Where a statute declares void all conveyances made with "intent to delay, hinder or defraud creditors," it is held that a conveyance made by one for the purpose of postponing the time of payment of a debt has the effect of depriving his creditor of a valuable right, and thereby perpetrates a legal fraud, regardless of what may be the grantor's motive in such act. *Monroe Mercantile Co. v. Arnold*, 108 Ga. 449 (34 S. E. Rep. 176). The court say: "But it will not do to construe the terms 'delay' and 'defraud,' as used in § 2695, subsec. 2, Civ. Code, as being synonymous. One of the legal and substantial rights which the law recognizes that every creditor has is the right to have his debts paid at maturity. It necessarily follows that any act done by the debtor with the intention of defeating that right, and with the intention of postponing or delaying a creditor in the collection of his debt to a period of time beyond that fixed in the contract, is a legal fraud upon the creditor. In this sense, therefore, is any intention to delay a creditor fraudulent in law. It does not follow that the intent to delay must be coupled with an actual moral fraud, intended to be perpetrated by the debtor upon his creditor, in order for it to constitute such a fraud as will invalidate the conveyance. The debtor's motive in making a conveyance for the purpose of delaying creditors may be entirely honest. To illustrate: He might have reason to believe, for instance, that unless he takes some steps he will be pressed to the wall by suits of creditors, his property will be greatly sacrificed, and thus litigation would terminate, not only in injury to him, but to the creditors also; and he might further conclude that, if he can arrange to postpone such action, it would inure to the benefit of the creditors themselves, by enabling him to continue his business longer, and thus realize an opportunity of paying his debts in full. Now, if a mortgage or a conveyance is

made to a creditor with the purpose of bringing about a postponement of payment of the debts due other creditors, which fact is known to the mortgagee at the time of its execution, it matters not what the motive of the debtor may be in desiring to delay other creditors. This very intention itself constitutes legal fraud, as distinguished from actual fraud. This question is thoroughly and lucidly discussed in *Bump, Fraud. Conv.*, § 21, as follows: 'Fraud consists of unlawful conduct that operates prejudicially upon the rights of others.' Again, in § 22, the author says: 'It is not necessary, however, that there should be an intent to defraud in order to render a transfer void. The statute makes void all conveyances made with "intent to delay, hinder or defraud creditors." This language implies that the intent to defraud is something distinct from the mere intent to delay or hinder, and that the latter alone will vitiate a transfer. The term "fraud" imports something of a more vicious character than the mere production of a delay of satisfaction.' In speaking further on this subject, in § 27, the author says: 'The statute refers to a legal, and not a moral, intent; for one man's right does not depend on another man's moral sense. The moral sense is much stronger in some men than in others. The statute, therefore, supposes that every one is capable of perceiving what is wrong, and if one does what is forbidden, intending to do it, he is not allowed to say that he did not intend to do the forbidden act. A man's moral perception may be so perverted as to imagine an act to be fair and honest which the law justly pronounces fraudulent and corrupt; but he is not, therefore, to escape from the consequence of it. The law must have a more certain standard for measuring men's intents than each individual's varying and capricious notions of right and wrong.' Further says the author: 'Fraud, therefore, does not necessarily impute a corrupt or dishonorable motive. Parties may do what they consider perfectly fair, for the purpose of preventing a sacrifice merely, and with the intention of paying all the creditors ultimately, or may be animated merely by motives of affection or compassion; but the law does not sanction any contrivance for either defeating or delaying creditors, and invalidates such contrivance without regard to the motive of the parties.' It is true the word 'delay' in the statute is to be taken in its legal or technical sense, and not necessarily in its literal sense. For instance, where the sole purpose of a debtor

is to secure his creditors, and there is no intent either to defraud or delay others, such preference of a particular creditor will be upheld, although the natural result of it may be to delay other creditors. Were the doctrine otherwise, it would be almost impracticable for a debtor to exercise the privilege of preference given by law; for he can in good faith secure a creditor by making to him a conveyance of all his property, yet the natural result of that would be necessarily to delay if not prevent the collection of debts due to others. But, whenever the purpose of a conveyance is to bring about such delay, then the law itself is violated, and the contract by which his property is transferred becomes tainted with a legal fraud. This doctrine has virtually been recognized by this court in the decision on the case of *Evans v. Coleman*, 101 Ga. 152 (28 S. E. Rep. 645), where it was held erroneous for a judge to charge a jury, in relation to such conveyance made by a debtor to a creditor, that such a conveyance is void if made with the intention to delay, hinder and defraud creditors, instead of stating the acts avoiding the conveyance disjunctively; thus indicating that the words as used in this statute convey an entirely different meaning. See opinion of Justice Fish in the case of *Conley v. Buck*, 100 Ga. 205 (28 S. E. Rep. 97)."

**Sec. 327. Conveyance of debtor's property to corporation organized by him in exchange for its stock.** When a person is largely indebted, and thereafter organizes a corporation, and has all of its capital stock issued to himself, except one share each to four persons, given by him to qualify them as directors, and then transfers all of his property to such corporation, and thereafter such corporation assumes the indebtedness of its creator and owner, one a stranger, and not a creditor of such corporation will not be heard to complain thereof. *Burke Land & Live-Stock Co. v. Wells, Fargo & Co.*, Ida. (60 Pac. Rep. 87). A conveyance by a failing debtor of all of his property to a corporation organized by him in exchange for stock in the corporation which he pledges to secure money with which to settle his debts, all of which is done after notice to all his creditors and with the consent of most of them, is not a fraud upon them. *Kingman & Co. v. Mowry*, 182 Ill. 256 (55 N. E. Rep. 330; 74 Am. St. Rep. 169). The court say: "The contention of appellant is that the transfer by a debtor of his property to a corporation necessarily hinders

and delays the creditor in the collection of his debts, and is in all instances a fraud, in legal contemplation. Adjudged cases are cited as in support of this position. We have examined these cases, and, while such transactions were condemned in the instances then under consideration, we do not understand it is to be deduced from them that it is a fixed rule of law that the formation of a corporation by the debtor, and the conveyance of all his property to the corporation, though made in actual good faith, is conclusively presumed to be fraudulent as a matter of law. One of such cases—*Bennett v. Minott*, 28 Or. 339 (44 Pac. Rep. 288) held, to quote from the opinion: 'When a debtor, for the purpose of hindering and delaying creditors, organizes a corporation, and transfers to it all his assets, he himself being the owner of practically all the corporate stock, and continuing the business the same after as before the incorporation, using the proceeds for his own benefit, equity will set aside such transfer at the instance of creditors, notwithstanding the incorporation is valid, and the corporate stock subscribed by the debtor is subject to sale under execution.' And in another—*Kellogg v. Bank*, 58 Kan. 43 (48 Pac. Rep. 587; 62 Am. St. Rep. 596) it was said: 'A fraud may be perpetrated by an insolvent merchant through the instrumentality of a corporation organized and controlled by himself, to which he transfers the bulk of his property, as well as by a transfer to an individual; and where it appears that this has been done for the purpose of hindering and delaying creditors, and enabling the debtor to retain the management and control of his property and of depriving his creditors of an opportunity to collect their dues, and when such insolvent retains substantially all the stock in the corporation, and no innocent person contributes any substantial sum to its assets, the court, in sustaining attachments levied on the property, and directing the sale thereof to satisfy the claims of creditors, is warranted in treating the whole transaction as a sham.' Expressions of the court in *Bank v. Trebein*, 59 O. St. 316 (52 N. E. Rep. 834) (the case most relied on), give some support to the view entertained by counsel for appellant, but in that case it was said: 'The formation of the corporation in no way facilitated the transaction of his [the debtor's] milling business and that connected with it. Nothing was added to his capital, unless we regard the few hundred dollars that may have been paid for the four



shares of stock taken by the other members of his family such an addition. Evidently an addition to capital was not the controlling object. \* \* \* The only purpose the creation of the corporation and the conveyance to it subserved was to hinder creditors in levying upon the property and selling it on execution at law; and it is this hindrance the law will not permit, and, when ascertained in a proper proceeding, requires the conveyance to be set aside, and the property administered for the benefit of all the creditors of the fraudulent grantors. \* \* \* We are clearly satisfied that the conveyance by Trebein of his property to the corporation was made to hinder and delay creditors, and should have been so declared by the court.' It is believed that in each of the cases relied upon some circumstance of fraudulent intent, as a reservation of a trust in favor of the debtor, the design to create and administer the corporation for the mere purpose of enabling the debtor to conduct his business under the guise of a corporation, and escape, even temporarily, his creditors, or some improper disposition or manipulation of the stock interest of the debtor to the injury of his creditors, or other like consideration, determined the action of the court. Certainly, if such a conveyance be made with the consent and approval of all of the creditors, it would be valid. If, as here, entered into after notice to all the creditors, and with the consent and approval of the greater number of them, as being the most desirable method of conserving the interests of all, without any purpose or design of defrauding any creditor, and the debtor retains the open ownership of the stock interest based upon the value of the property conveyed, and equally open, as was such property, to seizure and sale on execution against the debtor, as was the transferred property, the transaction cannot be deemed fraudulent, either in fact or as a matter of law."

Upon the subject of this section, the supreme court of Washington, in the case of *Troy v. Morse*, 22 Wash. 280 (60 Pac. Rep. 648), say: "The owner of property is not deprived of dominion over it by becoming insolvent, nor have his creditors any right to insist that his property shall remain in any given shape. 'He may exchange his property for other property, or sell it, and apply the proceeds, in his discretion, to his debts, his purchases, or his maintenance. He has the right to manage, control, mortgage, pledge, and deal with it, and

enter into business contracts in relation to it, in such way and manner as he deems will best conduce to its preservation and increase.' Neither is it fraudulent per se for an insolvent debtor to join with others in the formation of a corporation, convey and transfer his property to it, and accept its stock in payment of the property so conveyed and transferred. Such a transaction will not be set aside unless there is a specific intent on the part of the debtor to hinder, delay and defraud his creditors, which intent must be found outside of the mere transaction itself. *Sayers v. Mortgage Co.*, 78 Tex. 245 (14 S. W. Rep. 578); *Coaldale Coal Co. v. State Bank*, 142 Pa. St. 288 (21 Atl. Rep. 811); *Baker v. Naglee*, 82 Va. 876 (1 S. E. Rep. 191); *Paper Works v. Willett*, 1 Rob. (N. Y.) 132."

**Sec. 328. Conveyances in fraud of marital rights.**

A voluntary transfer or conveyance by which a husband, reserving to himself a benefit from or power of disposal over his property, parts with its ownership for the purpose of defeating his wife's interest in his estate, may be declared void as to her; and in an action brought by her for that purpose it is proper to admit evidence that he has also placed all his known personal estate in trust for and in the names of relatives and friends. *Brownell v. Briggs*, 173 Mass. 529 (54 N. E. Rep. 251). A conveyance by a man who has entered into a contract of marriage, which subsequently takes place, of a portion of his land to his sons by a former marriage, without consideration other than love and affection, and without the knowledge or consent of his contemplated wife, is a fraud on her marital rights, and she, at his death, is entitled to dower therein. *Spear, J.*, dissenting. *Ward v. Ward*, 63 O. St. 125 (57 N. E. Rep. 1095; 51 L. R. A. 858). Construing and applying How. Ann. Mich. Stat., § 6203, declaring void any conveyance made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, it is held that a conveyance made by a husband at a time when his wife has cause for divorce is fraudulent as to her claim for alimony. *Holland v. Holland*, 121 Mich. 109 (79 N. W. Rep. 1102). Particular evidence held insufficient to show that a conveyance made by a father to his children on the eve of his second marriage was a fraud on the marital rights of his second wife. *Clark v. Clark*, 183

Ill. 448 (56 N. E. Rep. 82; 75 Am. St. Rep. 115). Land conveyed by a son to his father as trustee for no consideration, solely for the purpose of depriving the son's wife of her dower, may be subjected to the claims of his creditors, *Shanklin v. McCracken*, 151 Mo. 587 (52 S. W. Rep. 339); but a conveyance by an improvident and spendthrift son of all his estate to his mother, in consideration of her agreement to pay him annually a certain sum as consideration, will not be set aside as a fraud upon the marital rights of a subsequent wife of the son to whom he did not become engaged until after the execution of the conveyance, *In re Coleman's Estate*, 193 Pa. St. 605 (44 Atl. Rep. 1085).

**Sec. 329. Conveyances between husband and wife.**

A conveyance of land from a husband to his wife, which is fraudulent as against creditors at the time it is made, cannot be sustained by relation back to a parol antenuptial agreement. *Barnes v. Black*, 193 Pa. St. 447 (44 Atl. Rep. 550; 74 Am. St. Rep. 694), following *Flory v. Houck*, 186 Pa. St. 263 (*Ballards' Law Real Prop.*, Vol. VII, § 318). An attempt by a husband to create a joint tenancy with his wife as to certain interests in real estate which are subject to his debts, which has the effect of hindering an existing creditor in the collection of his debt, will be held fraudulent as to the latter. *Foster v. Whelpley*, 123 Mich. 350 (82 N. W. Rep. 123). A conveyance by a partner made to his wife without valuable consideration, at a time when his assets and the assets of the firm after the conveyance were of value barely equal to the amount of his and the firm's indebtedness, is fraudulent as to his creditors, under N. H. Pub. Stat., ch. 201, § 26. *Bailey v. Ballou*, 69 N. H. 414 (44 Atl. Rep. 114). A husband's recorded voluntary conveyance of land to his wife, in the absence of evidence that he intended thereby to defraud one who became his creditor several years thereafter, is not fraudulent as to the latter. *Best v. Smith*, 193 Pa. St. 89 (44 Atl. Rep. 329; 74 Am. St. Rep. 676). A husband's conveyance of land to his wife in compliance with his agreement to repay money which he has received from her is not per se fraudulent as to his creditors, *McCandless v. Rea*, Ky. (56 S. W. Rep. 10; 21 Ky. Law Rep. 1687); but to the extent the value of land conveyed by a husband to his wife in payment of a bona fide indebtedness due from him to her and accepted by her in good

faith, exceeds the indebtedness, it may be subjected to the claims of his creditors, *Cox v. Collis*, 109 Ia. 270 (80 N. W. Rep. 343). A conveyance of land by a husband to his wife in repayment of funds originally belonging to her, which he appropriated by her consent and without any intention of creating an indebtedness, is void as against his creditors. *Preston Nat. Bank v. Leonard*, 122 Mich. 381 (81 N. W. Rep. 264); *Stacker v. Wilson*, Tenn. (52 S. W. Rep. 709). To the same effect are the cases of *Wood v. Peebles*, 121 Ala. 100 (25 So. Rep. 723); *First Nat. Bank v. McClellan*, 9 N. M. 636 (58 Pac. Rep. 347). The consideration for land conveyed to a husband and wife will be presumed to have been paid by him where his creditors seek to subject it to their claims by alleging that she paid no money for the property, *Murdoch v. Baker*, 46 W. Va. 78 (32 S. E. Rep. 1009); and in Kentucky it is held that, as against her husband's creditors, a wife must rebut the presumption that the money used in purchasing land conveyed to her belonged to her husband. *Edelmuth v. Wybrant*, Ky. (53 S. W. Rep. 528; 21 Ky. Law Rep. 929); *Rugless v. Robinson*, Ky. (57 S. W. Rep. 619). Where a conveyance by a husband to his wife is assailed for fraud by his creditors, the burden is upon her to show by clear and satisfactory evidence the good faith of the transaction, *First Nat. Bank v. McClellan*, 9 N. Mex. 636 (58 Pac. Rep. 347); *Crowder v. Garber*, 97 Va. 565 (34 S. E. Rep. 470); *Wood v. Peebles*, 121 Ala. 100 (25 So. Rep. 723); but the burden of proof is not shifted to her until the creditor establishes the existence of his claim prior to the execution of the deed assailed, *Ezzell v. Brown*, 121 Ala. 150 (25 So. Rep. 832). For particular conveyances from husband to wife held to be a fraud as to his creditors, see *Woods v. Allen*, 109 Ia. 484 (80 N. W. Rep. 540); *Manhard Hardware Co. v. Rothschild*, 121 Mich. 657 (80 N. W. Rep. 707); *Jenks v. McGowan*, 9 Okla. 306 (60 Pac. Rep. 239); *McConville v. Nation Valley Bank*, 98 Va. 9 (34 S. E. Rep. 891); *Wood v. Peebles*, 121 Ala. 100 (25 So. Rep. 723); *Slayden-Kirksey Woolen Mills v. Anderson*, 66 Ark. 419 (50 S. W. Rep. 994). Particular transactions between husband and wife held not fraudulent. *Earl v. Earl*, 186 Ill. 370 (57 N. E. Rep. 1079); *Hoeller v. Haffner*, 155 Mo. 589 (56 S. W. Rep. 312).

**Sec. 330. Improvements and profits arising from husband's expenditure of money and labor on his wife's land—Rights of his creditors.** The fact that a husband made permanent improvements out of his own funds on property which he purchased and caused to be conveyed to his wife properly may be considered in determining whether the conveyance was made to defraud his creditors. *Stadin v. Helin*, 76 Minn. 496 (79 N. W. Rep. 602). A husband will not be permitted to defraud his creditors by improving his wife's property with assets belonging to him. *Morris v. Fletcher*, 67 Ark. 105 (56 S. W. Rep. 1072; 77 Am. St. Rep. 87); *Slayden-Kirksey Woolen Mills v. Anderson*, 66 Ark. 419 (50 S. W. Rep. 994). Citing, *Seasongood v. Ware*, 104 Ala. 212 (16 So. Rep. 51); *Lynde v. McGregor*, 13 Allen, 182 (90 Am. Dec. 188); *Humphrey v. Spencer*, 36 W. Va. 11 (14 S. E. Rep. 410); *Campion v. Cotton*, 17 Ves. 264. The supreme court of Texas holds that the lands of a wife cannot be sold at the suit of her husband's creditors on account of his having made improvements thereon, unless it is shown clearly that the husband made improvements with his own or the community funds, with intent to defraud his creditors, and that the wife knowing of such intent participated in the fraud. *Maddox v. Summerlin*, 92 Tex. 483 (49 S. W. Rep. 1033). The court say: "The following cases hold that, when a husband improves his wife's separate property by the use of his own funds, his creditors may, by resort to a court of equity, cause the land to be sold, including the improvements, and apportion the proceeds between the creditors and the wife: *Kirby v. Bruns*, 45 Mo. 234 (100 Am. Dec. 376); *Lynde v. McGregor*, 13 Allen, 184 (90 Am. Dec. 188); *Humphrey v. Spencer*, 36 W. Va. 11 (14 S. E. Rep. 410). On the other hand, a greater number of courts, equally as able, hold that the land will not be subjected to sale at the suit of a creditor, unless the husband placed the improvements thereon with intent to defraud his creditors, and the wife knowing of such intent, participated in its accomplishment. *Blair v. Smith*, 114 Ind. 114 (15 N. E. Rep. 817; 5 Am. St. Rep. 593); *Heck v. Fisher*, 78 Ky. 643; *Isham v. Schafer*, 60 Barb. 317; *Robinson v. Huffman*, 15 B. Mon. 80 (61 Am. Dec. 177); *Corning v. Fowler*, 24 Ia. 584; *Webster v. Hildreth*, 33 Vt. 457 (78 Am. Dec. 632); *Barto's Appeal*, 55 Pa. St. 386; *Peck v. Brum-*

magim, 31 Cal. 440 (89 Am. Dec. 195); *Hughes v. Peters*, 1 Cold. 67; *Kelly v. Robertson*, 10 La. Ann. 309."

The fact that a part of a wife's separate property was accumulated by the labor, skill and management of her husband, which he donated to her, does not render it liable to the payment of his debts. *Deere, Wells & Co. v. Bonne*, 108 Ia. 281 (79 N. W. Rep. 59; 75 Am. St. Rep. 254); *Gruner v. Scholz*, 154 Mo. 415 (55 S. W. Rep. 441). In the first case numerous authorities are collated; and in the last case the court say: "In *Wait on Fraudulent Conveyances and Creditors' Bills* (§ 303) it is said: 'It is settled beyond controversy that a husband may manage the separate property of his wife without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors. The wife being vested with the right to hold and acquire property free from the control of her husband, the legitimate inference seems to result that she can employ whomsoever she desires as an agent to manage it. To deny her the right to select her husband for that purpose would constitute a very inequitable limitation upon her right of ownership, compelling her to resort to strangers for advice and assistance, and would perhaps seriously mar the harmony of the marriage relation. In *Tresch v. Wirtz*, 34 N. J. Eq. 129, the vice chancellor said: 'A man's creditors cannot compel him to work for them. A debtor is not the slave of his creditors.' The marital relation does not disqualify a husband from becoming the agent of his wife. All the property of a married woman is now her separate estate. She holds it as a feme sole, and has a right to embark it in business. She may lawfully engage in any kind of trade or barter. If she engages in business, and actually furnishes the capital, so that the business is in fact and truth hers, she has the right to ask aid of her husband, and he may give her his labor and skill, without rendering her property liable to seizure for his debts.' In the same work (§ 304) the following language is used: 'And where the wife was the owner of a farm upon which she resided, and which the husband carried on in her name, without any agreement as to compensation, it was held that neither the products of the farm, nor property taken in exchange therefor, could be attached by creditors of the husband. *Gage v. Dauchy*, 34 N. Y. 293.' In *Seay v. Hesse*, 123 Mo. 450 (24 S. W. Rep. 1019), this court said: 'In *Webster v. Hildreth*, 33 Vt. 457

(78 Am. Dec. 632), it is said: "Equity has no jurisdiction \* \* \* to compel men to work for their creditors who may perversely prefer to work for their wives and children, and leave honest debts unpaid." As was said in the case of *Feller v. Alden*, 23 Wis. 301: "For, if the farm were really the separate estate of the wife, as we have already said, the statute expressly declares that she may hold and enjoy it, with the rents and profits, in the same manner, and with the like effect, as though she were unmarried." It would seem to follow from this that she might cultivate the farm and manage the personal property by means of any agency which any other owner of such property might employ, and the produce thereof, with the increase of stock, would belong to her. In the case of *Gage v. Dauchy*, 34 N. Y. 297, the court say: "While the legislature leaves the husband the right and makes it his duty to live with his wife, he must necessarily live upon her farm, if they have no other place to live. Surely, it could not have been the object of the legislature to deprive the wife of the benefit of his services. The idea that there should be an agreement between them as to wages is absurd; for the legislature has not yet changed the common law so as to allow them to make a business contract with each other. Certainly there is no way provided to enforce it. But, even upon the grounds of equity, there is no reason why the husband should be entitled to the growing crops which he helps to cultivate on her farm. The law still requires him to support his wife and family. If it was competent for the husband and wife to make an agreement in respect to his labor, they might agree that he should bring the amount of his wages into the house, to expend in providing them with food and clothing. As he is, by law, bound to provide for his wife and family, the whole support of the family might be cast upon him, while she used the rents, issues and profits of her separate estate to enlarge her wardrobe, or to engage in some new business which the law allows her to carry on, on her sole and separate account, without interference of her husband." \* \* \* George Hesse had the right to give his personal services and skill to the management of his wife's property, without any other compensation than the support and maintenance of himself and family.' " For an exhaustive collation of authorities on the subject of this section, see note in 77 Am. St. Rep. 92-109.

**Sec. 331. Conveyances between near relatives.**

Courts carefully will scrutinize conveyances between near relatives when attacked by creditors, *First Nat. Bank v. Miller*, 163 N. Y. 164 (57 N. E. Rep. 308); but the fact that a conveyance by a failing debtor is made to a relative, of itself, will not render it fraudulent, *Brooks v. Jones*, 1a.

(82 N. W. Rep. 434); *Riddick v. Parr*, 111 Ia. 733 (82 N. W. Rep. .002). A conveyance made by a debtor who is insolvent or greatly embarrassed to relatives without consideration will be presumed to be fraudulent, *Webb v. Atkinson*, 124 N. C. 447 (32 S. E. Rep. 737); but a conveyance of land at a reasonable price by a solvent debtor to a relative in payment of a bona fide pre-existing debt, is not fraudulent as to his creditors, *Wallen v. Montague*, 121 Ala. 287 (25 So. Rep. 773). Where a conveyance between relatives is assailed as a fraud upon the grantor's creditors, the grantee has the burden of showing that it was made in good faith and for a valuable consideration. *Mendenhall v. Elwert*, 36 Or. 375 (59 Pac. Rep. 805). Sons of a grantor having knowledge of his financial condition, who take from him a voluntary conveyance, are charged with knowledge of its fraudulent character. *Reed v. Loney*, 22 Wash. 433 (61 Pac. Rep. 41).

**Sec. 332. Conveyance by parent to child to repay borrowed money earned by the latter during his minority, after his emancipation.** A father who has emancipated his minor sons at a time when he was solvent afterward may convey land to them in repayment of money which he borrowed from them and which was earned by them during their infancy. *Flynn v. Baisley*, 35 Or. 268 (57 Pac. Rep. 908; 76 Am. St. Rep. 495). The court say: "A conveyance of lands without a valuable consideration, by one who is indebted at the time, is presumptively a fraud upon his creditors, who have an equitable right to set it aside or to avoid it, at least to the extent of the debts due them. *El-felt v. Hinch*, 5 Or. 255; *Davis v. Davis*, 20 Or. 78 (25 Pac. Rep. 140); *Sterry v. Arden*, 1 Johns. Ch. 261. It being the duty of an infant to labor for his parent in consideration of the latter's furnishing him maintenance and education, it has been held that a deed of land executed by an insolvent parent to his infant child in consideration of serv-



ices rendered or to be rendered during his minority is voluntary, and void as to creditors of the grantor. *Swartz v. Hazlett*, 8 Cal. 118; *Stumbaugh v. Anderson*, 46 Kan. 541 (26 Pac. Rep. 1045; 21 Am. St. Rep. 121). A father, who was solvent, having made a deed to his minor son in consideration of wages earned and a note executed by him, it was held that the conveyance was voluntary, and void as to the grantor's creditors. *Winchester v. Reid*, 53 N. C. 377. In *Bell v. Hallenback*, Wright, 752, it is held that if a father, who at the time is indebted, invests the earnings of the minor children in real estate, and takes the title in their names, the premises will be charged with the debts he then owed. In *Jolly v. Kyle*, 27 Or. 95 (39 Pac. Rep. 999), it is said: 'Conveyances from one relative to another, when attacked by the creditors of the grantor, will always be closely scrutinized, for from the very relation of the parties it is scarcely to be supposed that the circumstances and intention of the grantor were not known to the grantee.' To the same effect, see also, *Burt v. Timmons*, 29 W. Va. 441 (2 S. E. Rep. 780; 6 Am. St. Rep. 664); *Shober v. Wheeler*, 113 N. C. 370 (18 S. E. Rep. 328). Where, however, the parent has in good faith emancipated his minor child, and relinquished all right to his earnings, his creditors cannot reach earnings thereafter acquired by such minor to apply them in payment of the parent's debts. 17 Am. & Eng. Enc. Law, 379. In *Jenney v. Alden*, 12 Mass. 375, a father, who was in good financial circumstances, having agreed that his minor son should have the benefit of his own wages, the latter sent his earnings from time to time to his father, who invested them in real property, taking the title in his son's name; and, the father thereafter becoming insolvent, it was held that the property was not liable for the payment of his debts. In *Atwood v. Holcomb*, 39 Conn. 270 (12 Am. Rep. 386), it was held that a father, acting in good faith, may make a valid gift to his minor son of his time and future earnings, although insolvent at the time. In *Clemens v. Brillhart*, 17 Neb. 335 (22 N. W. Rep. 779), Mr. Justice Maxwell says: 'Creditors have no vested rights in the future earnings of the minor children of the debtor.' 'A son,' says Mr. Justice Black in *McCloskey v. Cyphert*, 27 Pa. St. 220, 'is bound to render obedience to his father until he is twenty-one

years of age. The father may employ him about his own business without paying him wages, or hire him out, and appropriate his earnings, if he sees fit. But he may also let him go free from his service whenever he chooses. If he happens to be in debt, he is not bound to work his son or daughter as he would work a horse or a slave for the benefit of his creditors.' To the effect that the right of a parent to the labor of his child during its minority is personal, and that, though insolvent at the time, he may, for the best interest of the child, emancipate him, and, as a consequence, place his earnings beyond the reach of his creditors, see *Donegan v. Davis*, 66 Ala. 362; *Shortel v. Young*, 23 Neb. 408 (36 N. W. Rep. 572); *Beaver v. Bare*, 104 Pa. St. 58 (49 Am. Rep. 567); *Wambold v. Vick*, 50 Wis. 456 (7 N. W. Rep. 438); *Lackman v. Wood*, 25 Cal. 147; *Wilson v. McMillan*, 62 Ga. 16 (35 Am. Rep. 115)."

**Sec. 333. Voluntary conveyances.** A transfer by the holder of the legal title to the equitable owner, although without pecuniary consideration, is not a voluntary conveyance so as to be a fraud upon the grantor's creditors. *Stanton v. Crane*, Nev. (58 Pac. Rep. 53). A voluntary conveyance by a husband to his wife without any pecuniary consideration moving from her is void as to all his existing creditors, *Lander v. Ziehr*, 150 Mo. 403 (51 S. W. Rep. 742; 73 Am. St. Rep. 456); but a voluntary deed from a husband to his wife and children executed and delivered in good faith at a time when he was entirely solvent, passes title as against a subsequent judgment obtained against him before the deed was recorded, *Lytte v. Black*, 107 Ga. 386 (33 S. E. Rep. 414). A conveyance by a father to his son and daughter as compensation for domestic services rendered by her while a member of his family, not shown to have been performed under a prior agreement or understanding that she should receive compensation, and in consideration of their present agreement to support the grantor and his wife during their lives, constitutes on its face a voluntary conveyance which is void as against the grantor's creditors. *McCord v. Knowlton*, 79 Minn. 299 (82 N. W. Rep. 589).

**Sec. 334. Insolvency of debtor as affecting his deed.**

A conveyance of land is not a fraud as to existing creditors, where, if, at the time of its execution, the grantor could have realized a fair market value for the remainder of his property, it would have been sufficient to have paid all his debts. *Stratton v. Edwards*, 174 Mass. 374 (54 N. E. Rep. 886). The insolvency of a vendor may be considered, in connection with other material facts, in determining the good faith of the parties to a sale of property; but it cannot be said, as a matter of law, that a knowledge of the insolvency of the vendor alone is sufficient to charge the purchaser with notice of a fraudulent intent on the part of the vendor. *Vickers v. Buck Stove & Range Co.*, 60 Kan. 598 (57 Pac. Rep. 517). Under Ga. Civ. Code, § 1979, a conveyance by an insolvent bank, not made for the benefit of all of its creditors and stockholders, to one who at the time of receiving the instrument either had actual knowledge of the bank's condition, or was chargeable with notice of its insolvency, is void. *Clarke v. Ingram*, 107 Ga. 565 (33 S. E. Rep. 802). See opinion for exhaustive discussion of what constitutes notice to such a grantee. Insolvency of a debtor whose conveyance is assailed for fraud may be proved by general reputation. *Webb v. Atkinson*, 124 N. C. 447 (32 S. E. Rep. 737).

**Sec. 335. Preference of creditors.** A husband may prefer his wife by the payment of a bona fide indebtedness due her to the exclusion of his other creditors. *Earl v. Earl*, 186 Ill. 370 (57 N. E. Rep. 1079; *McElwee v. Kennedy*, 56 S. C. Rep. 154 (34 S. E. Rep. 86). A bona fide creditor, although a relative of the debtor, has a right to secure himself, where he acts in good faith, although he knows that thereby the chances of other creditors to realize on their claims will be lessened. *Riddick v. Parr*, 111 Ia. 733 (82 N. W. Rep. 1002); *Warren v. Hinson*, Tenn. (52 S. W. Rep. 498); *McGrew v. Hancock*, Tenn. (52 S. W. Rep. 500). A deed of trust executed by a failing debtor to effect a lawful preference, although he thereby intends to hinder and delay other creditors, of which fact the trustee and the preferred creditor have knowledge, will not be held void as to other creditors, where the trustee and preferred creditor acted only to secure the

preference. *Crothers v. Busch*, 153 Mo. 606 (55 S. W. Rep. 149). An insolvent corporation may prefer any one of its bona fide creditors, though he be a director or officer of the corporation and as such participates in the transaction giving him the preference. *Corey v. Wadsworth*, 118 Ala. 488 (25 So. Rep. 503; 44 L. R. A. 766); *Anderson v. Bullock Co. Bank*, 122 Ala. 275 (25 So. Rep. 523); *State v. Manhattan Rubber Mfg. Co.*, 149 Mo. 181 (50 S. W. Rep. 321). The opinion of the court in the first case cited and the opinion of ex-Justice Coleman, printed in connection with it, contain a most exhaustive review of the authorities on both sides of this question.

**Sec. 336. Preference of creditors—Conveyances in contemplation of insolvency.** Where a husband becomes a cograntee with his wife of incumbered lands purchased by her in consideration of an agreement with him to pay the incumbrance which he fails to do and she pays the incumbrance, his implied obligation to repay her is a sufficient consideration for a deed by him of his interest in the land executed to her on the eve of his insolvency, so as to take it out of the provision of Cal. Civ. Code, § 3442, making a voluntary deed in contemplation of insolvency fraudulent as to creditors. *Greenawalt v. Mueller*, 126 Cal. 636 (59 Pac. Rep. 137). One to whom a transfer of property has been made by a debtor, in contemplation of insolvency, in trust to prefer one or more creditors, may, before any legal steps are taken have it declared a trust for the benefit of all the debtor's creditors, renounce the trust, and restore the property, without becoming individually liable for its value. Such renunciation does not, however, affect the right of other creditors to have the character of the transfer judicially determined, and the property administered as a trust for the benefit of all creditors, under the insolvency laws of the state. *Robertson v. Desmond*, 62 O. St. 487 (57 N. E. Rep. 235). S. C. Rev. Stat., § 2147, declaring void a conveyance by an insolvent made by him within sixty days of an assignment for creditors, with intent to give an unlawful preference, applies only when the deed of assignment is valid. *Finley v. Cartwright*, 55 S. C. 198 (33 S. E. Rep. 359). The statute does not render invalid a conveyance by an insolvent in pursuance of a

parol agreement to hold the title to land in trust for the persons furnishing part of the consideration, entered into before his insolvency. *Finley v. Moore*, 55 S. C. 195 (33 S. E. Rep. 362). W. Va. Code, ch. 74, § 2, construed and applied—conveyance taken by insolvent with view of giving preference—rights of bona fide purchaser. *Carr v. Summerfield*, 47 W. Va. 155 (34 S. E. Rep. 804).

**Sec. 337. Property exempt from execution or held in trust.** There can be no fraudulent conveyance of property which is exempt from liability for the owner's debts, *Luhrs v. Hancock*, Ariz. (57 Pac. Rep. 605); *Finley v. Cartwright*, 55 S. C. 198 (33 S. E. Rep. 359); *White v. Sewing-Machine Co. v. Wooster*, 66 Ark. 382 (50 S. W. Rep. 1000; 74 Am. St. Rep. 100); but in a suit to set aside a fraudulent conveyance of property, one claiming the property as exempt has the burden of proving that fact, *Pace v. Robbins*, 67 Ark. 232 (54 S. W. Rep. 213). A homestead conveyed by a husband to his wife without any consideration and for the purpose of withholding such property from existing and subsequent creditors in case they should remove therefrom, and with other funds purchase and occupy a different homestead, will be held subject to the claims of creditors after its homestead character ceases. *Kettleschlager v. Ferrick*, 12 S. Dak. 455 (81 N. W. Rep. 889; 76 Am. St. Rep. 623). A conveyance by a grantee in an absolute deed in execution of a parol trust, subject to which he took the title, will be upheld, as against his creditors, though executed after their claims accrued; and in such a case, parol evidence is admissible to establish the trust. *Richmond v. Bloch*, 36 Or. 590 (60 Pac. Rep. 385). This case is expressly followed and approved by the supreme court of Washington, in the case of *Gottstein v. Wist*, 22 Wash. 581 (61 Pac. Rep. 715).

**Sec. 338. Force and effect of fraudulent conveyance between parties to it—Reconveyance by fraudulent grantee.** A conveyance in fraud of creditors is good between the parties, *Stratton v. Edwards*, 174 Mass. 374 (54 N. E. Rep. 886); *Shoemaker v. Finlayson*, 22 Wash. 12 (60 Pac. Rep. 50); and will bar the right of a subsequent wife of the grantor to claim dower in the land conveyed, *Adkins*

v. Adkins, Tenn. (52 S. W. Rep. 728). Under Sand. & H. Ark. Dig., § 3472, providing that "every conveyance \* \* \* of any estate or interest in lands made or contrived with the intent to hinder, delay or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts or demands, as against creditors and purchases prior and subsequent shall be void," it is held that such a conveyance is not void per se, but only voidable; and it carries the legal title subject only to be avoided by creditors and purchasers. *Doster v. Manistee Nat. Bank*, 67 Ark. 325 (55 S. W. Rep. 137; 77 Am. St. Rep. 116; 48 L. R. A. 334). One to whom a conveyance of real estate is made with intent to hinder, delay or defraud the grantor's creditors, and for no consideration except the promise of such grantee to reconvey to the grantor on request, takes title to the property as against all the world except the creditors of the grantor, and he has such a title as may be subjected to the claims of his creditors; but the moral obligation resting upon him to reconvey to his grantor upon his request is a sufficient consideration to support such reconveyance, and where no credit was given on the strength of the apparent ownership of such grantee, and where the reconveyance was made before any claims against him attached as liens upon the land, such reconveyance will be upheld, as against his creditors, although made with intent to defraud them, of which fact the original owner had knowledge, where such reconveyance was made at the request of the latter. *Lockren v. Rustan*, 9 N. Dak. 43 (81 N. W. Rep. 60). See opinion for collation of authorities.

**Sec. 339. Force and effect of fraudulent conveyance between parties to it—Rights upon setting aside of deed.** A wife of one of two tenants in common of real estate taking from her husband a conveyance of his undivided interest which is fraudulent as to his creditors, who afterward on partition acquires a greater interest in the property by payment of owelty out of her own funds, is entitled to have such additional interest protected upon a subsequent setting aside of her husband's conveyance. *Brinker v. Brinker*, 105 Wis. 231 (81 N. W. Rep. 402). A decree cancelling a conveyance so far as the rights of the grantor's

creditors are concerned, does not operate to invest the grantor with any title upon which he can claim the land or the proceeds arising out of the sale thereof under the court's decree as an exemption under Ind. Rev. Stat. 1894, § 715 (Rev. Stat. 1901, § 715). *McNally v. White*, 154 Ind. 163 (54 N. E. Rep. 794). Applying the rule that a fraudulent conveyance is binding on the parties to it, it is held that a decree declaring such a deed null and void and that it be delivered up and cancelled, rendered in an action brought by the creditors of the grantor to declare such deed fraudulent and void because it was executed for the purpose of hindering, delaying, and defrauding them, will not be construed as adjudicating the invalidity of the instrument as between the parties thereto and will not restore to the grantor his title, so as to give him the right to claim a homestead. *McDowell v. McMurria*, 107 Ga. 812 (33 S. E. Rep. 709; 73 Am. St. Rep. 155). A judgment in favor of a husband's creditors subjecting land conveyed to his wife to the payment of their claims bars his right to a homestead where he made no claim of homestead in the proceedings in which it was rendered. *Buffington v. Mosby*, Ky. (51 S. W. Rep. 192; 21 Ky. Law Rep. 297).

**Sec. 340. Rights of subsequent creditors.** A disposition of property by a solvent debtor for an adequate consideration without actual intent to defraud creditors, cannot be questioned by subsequent creditors. *Hamilton v. Menominee Falls Quarry Co.*, 106 Wis. 352 (81 N. W. Rep. 876). In order to establish an intent on the part of a grantor to defraud subsequent creditors, it is not enough to show that he had a general purpose to secure the property from all hazards of future business and the claims of future creditors, but it must appear that at the time of the conveyance he had an actual intent to contract debts, and a purpose to avoid the payment of them by the conveyance. *Stratton v. Edwards*, 174 Mass. 374 (54 N. E. Rep. 886). Deeds executed for a valuable consideration can be impeached only by subsequent creditors on the ground of actual fraud in which the grantee participated. *H. B. Claflin & Co. v. Freudenthal*, 58 N. J. Eq. 298 (43 Atl. Rep. 529). A voluntary conveyance by a debtor cannot be set aside at the instance of a subsequent creditor

who had notice, either actual or constructive, without some proof of actual moral fraud. *Gentry v. Lanneau*, 54 S. C. 514 (32 S. E. Rep. 523; 71 Am. St. Rep. 814); *O'Kane v. Vinnedge*, Ky. (55 S. W. Rep. 711; 21 Ky. Law Rep. 1551). A voluntary conveyance by a husband to his wife will be declared fraudulent as to subsequent creditors from whom he procures means with which to pay existing debts by fraudulently holding out to them his ownership of the property over which he continued to exercise acts of ownership, and promising to give them a lien thereon. *Lander v. Ziehr*, 150 Mo. 403 (51 S. W. Rep. 742; 73 Am. St. Rep. 456). Subsequent creditors who have been defrauded by their debtor's mortgage being withheld from record in pursuance of a fraudulent agreement, may attack its validity by intervening in an action for its foreclosure, although their judgments were rendered after an assignment by the debtor for the benefit of his creditors and the mortgage was valid as to his assignee. *Hitt v. Sterling-Goold Mfg. Co.*, 111 Ia. 458 (82 N. W. Rep. 919).

**Sec. 341. Setting aside—Who may maintain the action.** An administrator may maintain an action to set aside a fraudulent conveyance made by his decedent, the estate in his hands being insufficient to pay the debts. *Webb v. Atkinson*, 124 N. C. 447 (32 S. E. Rep. 737). The action may be brought by the fraudulent grantor's assignee for the benefit of his creditors. *Searles v. Little*, 153 Ind. 432 (55 N. E. Rep. 93). The creditors of a partnership the assets of which are not sufficient to pay its debts, notwithstanding the pendency of a receivership, may maintain an action to set aside a voluntary conveyance executed by one of the partners for the purpose of defrauding their creditors. *Edmonds T. Brown Co. v. Allen*, 56 S. C. 237 (34 S. E. Rep. 390). Upon the death of a mortgagor executing a mortgage to defraud his creditors, an action to set aside may be maintained by the creditors of his heir, where the latter colluded with the mortgagee to keep it alive to defraud his creditors. *Dorrah v. Holberg*, Miss. (25 So. Rep. 661). Creditors of a husband who have compromised their claims with him after the recording of a conveyance of land by him to his wife, cannot maintain an action to set aside such conveyance as fraudulent. *A. Landreth Co. v. Schevenel*, 102 Tenn. 486 (52



S. W. Rep. 148). A decree in foreclosure proceedings making a defendant personally liable "for any balance of money that may be found due to the complainant over and above the proceeds of the sale or sales," rendered under Ill. Rev. Stat., ch. 95, § 16, does not make the holder of such a decree a judgment creditor so as to enable him to maintain a creditor's bill against the defendant. *Cotes v. Bennett*, 183 Ill. 82 (55 N. E. Rep. 661). An injunction bond payable on the contingency specified in its condition, given before a deed to land, which, on account of being a preference of one creditor over others, stands for the benefit of all creditors, gives the holder of a judgment recovered on such bond after the date of the deed all the rights of a creditor, under W. Va. Code 1891, ch. 74, § 2. *First Nat. Bank v. Parsons*, 45 W. Va. 688 (32 S. E. Rep. 271). A divorced wife to whom an allowance of alimony is made in her decree of divorce is a creditor of her husband, and may maintain an action to set aside a subsequent conveyance of his land made by him to defeat the payment of her claim. *Campbell v. Trosper*, Ky. (57 S. W. Rep. 245).

**Sed. 342. Setting aside—Reducing claim to judgment—Exhausting legal remedies.** In Connecticut it is not necessary that a judgment should be rendered before the bringing of the creditor's bill, as it may be rendered in an action in which the equitable relief is sought. *Huntington v. Jones*, 72 Conn. 45 (43 Atl. Rep. 564). In Alabama a judgment creditor may sue to set aside a fraudulent conveyance by his judgment debtor without the issuance and return of an execution unsatisfied, *Henderson v. Farley Nat. Bank*, 123 Ala. 547 (26 So. Rep. 226); and he may maintain the action though the judgment debtor has other legal assets out of which the creditor may enforce the collection of his debts, *Henderson v. Farley Nat. Bank*, 123 Ala. 547 (26 So. Rep. 226). Ky. Stat., § 1907a (Act Mar. 16, 1896), dispensing with the necessity of a judgment and return of nulla bona as a basis for an action to set aside a conveyance as a fraud upon creditors, being remedial in its nature, applies to actions pending at the time it went into effect. *O'Kane v. Vinnege*, Ky. (55 S. W. Rep. 711; 21 Ky. Law Rep. 1551). Under Sand. & H. Ark. Dig., § 3134, a judgment creditor cannot maintain an action to set aside a fraudulent convey-

ance made by one of several joint judgment debtors without showing the insolvency of all of them, unless it is made to appear that the other debtors are sureties merely. *Euclid Ave. Nat. Bank v. Judkins*, 66 Ark. 486 (51 S. W. Rep. 632). Substantially the same is held in *Riddick v. Parr*, 111 Ia. 733 (82 N. W. Rep. 1002). A creditor having a legal lien on property of his debtor, the enforcement of which is obstructed by a fraudulent conveyance made by the latter, is not required in an action to set aside such conveyance, to allege or prove that the debtor has no other property or that he is insolvent or that any execution has been returned unsatisfied; nor does the mere fact that such a creditor has collateral security for his judgment raise any equity in favor of the fraudulent grantee, to compel the creditor first to exhaust his collateral security. *Spooner v. Travelers' Ins. Co.*, 76 Minn. 311 (79 N. W. Rep. 305; 77 Am. St. Rep. 651).

**Sec. 343. Setting aside—Complaint.** A complaint to set aside a conveyance as fraudulent must describe the land affected by it, and it is not sufficient merely to refer to the record of the deed without filing a copy of it. *Stacker v. Wilson*, Tenn. (52 S. W. Rep. 709). Facts constituting the fraud must be alleged; mere general allegations of fraud are insufficient. *Boutwell v. Vandiver*, 123 Ala. 634 (26 So. Rep. 222). An averment that the conveyances sought to be set aside "were without consideration, and made for the purpose of covering up and concealing the ownership of the property," accompanied by the averment that the grantor "has since these pretended conveyances claimed to be the owner of the property, and used and controlled it," amounts in effect to a charge that the conveyances were made with fraudulent intent. *O'Kane v. Vinnedge*, Ky. (55 S. W. Rep. 711; 21 Ky. Law Rep. 1551). Insolvency of the debtor is shown sufficiently by a complaint alleging that an execution on the plaintiff's judgment was returned unsatisfied and that the property was transferred by the alleged fraudulent conveyance constitutes all the debtor's property. *Reed v. Loney*, 22 Wash. 433 (61 Pac. Rep. 41).

**Sec. 344. Setting aside—Parties.** The fraudulent grantor is a proper party. *Cedar Rapids Nat. Bank v. Lavery*, 110 Ia. 575 (81 N. W. Rep. 775; 80 Am. St. Rep.

325). The grantor and the heirs of the grantee, he being dead, are necessary parties. *Bevins v. Eisman*, Ky. (56 S. W. Rep. 410; 21 Ky. Law Rep. 1772). In an action to set aside a confession of judgment and deed thereunder, as a fraud on creditors of the judgment defendant, the party in possession and the administrator and the heir at law of the judgment creditor are necessary parties. *Sloan v. Hunter*, 56 S. C. 385 (34 S. E. Rep. 658; 76 Am. St. Rep. 551). Several grantees who have acquired different portions of property under separate and distinct conveyances, executed at different times, may be joined as defendants in an action to set aside the conveyances as fraudulent, although the several sales and conveyances had no connection with each other in any way. *Henderson v. Farley Nat. Bank*, 123 Ala. 547 (26 So. Rep. 226).

**Sec. 345. Setting aside—Liens and priorities of creditor bringing action.** Construing and applying *Sand. & H. Ark. Dig.*, §§ 3049, 3472, 4204, the supreme court of that state, in the case of *Doster v. Manistee Nat. Bank*, 67 Ark. 325 (55 S. W. Rep. 137; 77 Am. St. Rep. 116; 48 L. R. A. 334), conclude an elaborate opinion by saying: "After a careful analysis and comparison of our own cases and all the other authorities at our command, we are of the opinion that judgment creditors have no lien, by virtue of the statute, upon lands which have been fraudulently conveyed prior to the rendition of their judgments, and that at least the proper, if not the only, remedy for them in such cases is to go into equity to uncover such conveyances, and that the creditor who exercises superior diligence in that regard by first bringing his suit and proceeding to uncover such assets is entitled to the proceeds."

**Sec. 346. Setting aside—Practice.** Upon proof of the debtor's declaration that the property embraced in the conveyance asserted to be fraudulent was all the property he had a presumption arises that his financial condition remained the same down to the time of the commencement of the action. *Burlington Protestant Hosp. Ass'n v. Gerlinger*, 111 Ia. 293 (82 N. W. Rep. 765). A decree setting aside as fraudulent a grantor's conveyance does not affect his prior mortgage of the same land to the grantee. *First Nat. Bank v. Miller*, 163 N. Y.

164 (57 N. E. Rep. 308). In Indiana a court setting aside a fraudulent conveyance at a suit of creditors may direct a sale of the property upon an order of sale instead of an execution; and under Rev. Stat. 1894, § 755 (Rev. Stat. 1901, § 755), such a sale may be made without benefit of the appraisement law. *McNally v. White*, 154 Ind. 163 (54 N. E. Rep. 794). Where, in an action for damages for tort, the court has before it all the parties to a conveyance by a defendant which is found to be fraudulent, it may appoint commissioners to allot the defendant a homestead and decree a sale of the excess and application of the proceeds to the satisfaction of the judgment. *Beton v. Collins*, 125 N. C. 83 (34 S. E. Rep. 242; 47 L. R. A. 33). A bill by a judgment creditor against successive grantees of property to set aside the conveyances to them as fraudulent which does not allege their insolvency does not authorize the appointment of a receiver for the property without notice to them merely because it alleges an apprehension on the part of the plaintiff that if the notice of the appointment of a receiver be given the property would be disposed of by them. *Gilreath v. Union Bank & T. Co.*, 121 Ala. 204 (25 So. Rep. 581). In an action by an administrator, under How. Ann. Mich. Stat., § 5884, to set aside a conveyance of his decedent as a fraud upon his creditors, brought against a grantee who has paid the consideration before the probate of the estate, such grantee is not bound by the probate proceedings allowing claims of creditors, to which he was not a party, but he may contest the validity of such claims in the action. *Seymour v. Wallace*, 121 Mich. 402 (80 N. W. Rep. 242). In Tennessee seven years continuous possession of land by a wife under a deed from her husband bars an action by his creditors to set aside the conveyance, though the husband lives with the wife on the land for a part of the time. *Stacker v. Wilson*, Tenn. (52 S. W. Rep. 709).

**Sec. 347. Setting aside—Proof of fraud—Admissions and declarations of parties.** Declarations by a mortgagor that his mortgage was executed to defraud creditors are not admissible against the mortgagee in an action by creditors to set the mortgage aside. *Boli v. Irwin*, Ky. (51 S. W. Rep. 444; 21 Ky. Law Rep. 366). Declarations made by a grantor to third person, in the absence of the grantee, years after the deed is made and recorded, impeaching it for fraud

are not admissible, after the death of the grantor. *Sullivan v. Ball*, 55 S. C. 343 (33 S. E. Rep. 486). In the absence of evidence of a joint interest or privity of design between them, a husband's declaration made after a conveyance of land to his wife and delivery of possession to her, as to his intention in making the conveyance, are inadmissible to impeach her title. *Lent v. Shear*, 160 N. Y. 462 (55 N. E. Rep. 2). Admissions of a wife made after the execution of a conveyance to her husband are not admissible against him in an action against them by her creditors to set aside the conveyance as fraudulent, *Cedar Rapids Nat. Bank v. Lavery*, 110 Ia. 575 (81 N. W. Rep. 775; 80 Am. St. Rep. 325). Declarations of a husband made before his marriage and prior to his making an antenuptial contract to convey land to his wife, showing that he was indebted to third persons, are admissible in an action to declare fraudulent as to creditors a conveyance of land by him to his wife in pursuance of the parol antenuptial agreement. *Barnes v. Black*, 193 Pa. St. 447 (44 Atl. Rep. 550; 74 Am. St. Rep. 694).

**Sec. 348. Setting aside—Proof of fraud.** The burden primarily is upon him who assails the conveyance, but it is shifted to them who try to uphold the conveyance when a *prima facie* case of fraud is shown. *American Net & Twine Co. v. Mayo*, 97 Va. 182 (33 S. E. Rep. 523). Where a deed is shown to have been executed and delivered for a valuable consideration, one assailing it as a fraud upon creditors has the burden of proving a fraudulent intent on the part of the grantor and that the grantee was in some way a party to such fraud by purchasing with knowledge of such fraudulent intent, or under such circumstances as would put him on inquiry as to the fraud of the grantor. *Casey v. Leggett*, 125 Cal. 664 (58 Pac. Rep. 264). When a man enters into a contract of marriage with a woman, and commits a breach thereof, and she sues him for nonperformance, and during the pendency of such suit, to escape the payment of any judgment against him therein, he, under cover of a second contract of marriage with another woman, and under pretense of consideration therefor, conveys all his property, thus rendering himself hopelessly insolvent, if the facts and circumstances are sufficient to justify the presumption of notice to the grantee, of the fraudulent intent of the grantor, the burden of proof

is shifted to such grantee, and it devolves upon her to prove want of such notice; and, if she fails to testify with regard thereto, such presumption becomes conclusive. *Dent v. Pickens*, 46 W. Va. 378 (33 S. E. Rep. 303). As against the holder of a prior unrecorded mortgage, a grantee in a deed executed under such circumstances as clearly to indicate that it was made in fraud of creditors, has the burden of showing that it was based upon a sufficient consideration. *Leonhard v. Flood*, Ark. (56 S. W. Rep. 781). Where the conveyance is shown to have been given for a debt, the grantee has the burden of showing that there was a valuable consideration, and the mere production of notes given by him for the debt is not sufficient for this purpose. *Reeves v. Estes*, 124 Ala. 303 (26 So. Rep. 935).

**Sec. 349. Setting aside—Proof of fraud—Evidence—Particular cases.** A court cannot set aside a conveyance as fraudulent on mere suspicion. *Warden v. Fulkerson*, Ky. (56 S. W. Rep. 717). Proof of fraud on the part of the grantee is not necessary where there was no valuable consideration for the conveyance. *Corey v. Morrill*, 71 Vt. 51 (42 Atl. Rep. 976). Under Neb. Comp. Stat., ch. 32, § 20, the question of fraudulent intent is one of fact. *Oak Creek Val. Bank v. Helmer*, 59 Neb. 176 (80 N. W. Rep. 891). A fraudulent intent on the part of a grantee may be proved by circumstantial evidence. *Murdock v. Baker*, 46 W. Va. 78 (32 S. E. Rep. 1009). Where the holder of a husband's note assails a conveyance by the latter to his wife as fraudulent, the note itself without proof of its execution is not admissible in evidence against the wife. *Ezzell v. Brown*, 121 Ala. 150 (25 So. Rep. 832). The mere withholding from record of a deed taken by a grantee in good faith and for a valuable consideration, does not connect him with the fraudulent intent of the grantor in subsequent transactions with the grantor's creditors, so as to render the deed fraudulent as to them. *H. B. Claflin & Co. v. Freudenthal*, 58 N. J. Eq. 298 (43 Atl. Rep. 529). Conversations of the parties in negotiating and consummating the contracts, out of which arose the consideration for the alleged fraudulent transfer, are admissible in evidence. *Bennett v. McDonald*, 60 Neb. 47 (82 N. W. Rep. 110). In an action by a judgment creditor attacking as fraudulent a conveyance made by his judgment debtor before the rendition of

the judgment, the judgment is not, at least as against the grantee, evidence of the antecedent existence of the indebtedness for which it was rendered. *Hoerr v. Mehofer*, 77 Minn. 228 (79 N. W. Rep. 964; 77 Am. St. Rep. 674). Va. Laws 1893-94, p. 722; Laws 1897-98, p. 753, construed and applied—competency of husband and wife as witnesses in case conveyance between them is assailed for fraud. *Hoge v. Turner*, 96 Va. 624 (32 S. E. Rep. 291); *Crowder v. Garber*, 97 Va. 565 (34 S. E. Rep. 470).

Particular case in which a confession of judgment and sale of land on execution thereunder was held not to be fraudulent as to the debtor's other creditors. *Sloan v. Hunter*, 56 S. C. 385 (34 S. E. Rep. 658; 76 Am. St. Rep. 551). For particular fact cases in which the evidence is held sufficient to show conveyances to be fraudulent as to creditors, see *Union Square Nat. Bank v. Simmons*, N. J. Eq. (42 Atl. Rep. 489); *First Nat. Bank v. Miller*, 163 N. Y. 164 (57 N. E. Rep. 308); *Huffman v. Nixon*, 152 Mo. 303 (53 S. W. Rep. 1078; 75 Am. St. Rep. 454); *National State Bank v. McCormick*, N. J. Eq. (44 Atl. Rep. 706); *Burlington Protestant Hosp. Ass'n v. Gerlinger*, 111 Ia. 293 (82 N. W. Rep. 765); *American Net & Twine Co. v. Mayo*, 97 Va. 182 (33 S. E. Rep. 523); *Loving v. Meyler*, Ky. (49 S. W. Rep. 961; 20 Ky. Law Rep. 1654). For particular cases in which the evidence was held insufficient to show that a deed was executed to defraud creditors, see *Merchants' Nat. Bank v. Lyon*, 185 Ill. 343 (56 N. E. Rep. 1083); *McMillan v. Stephens*, Ky. (49 S. W. Rep. 778; 20 Ky. Law Rep. 1528); *St. Louis Nat. Bank v. Field*, 154 Mo. 368 (55 S. W. Rep. 461); *Grimmett v. Midgett*, Tenn. (57 S. W. Rep. 399).

# HOMESTEAD

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## EPITOME OF CASES.

**Sec. 350. Who may claim a homestead.** A debtor residing on land who has living with him a granddaughter who does his cooking and washing for him and whom he supports, is a housekeeper with a family, within the meaning of the homestead statute of Kentucky. *Collins v. Gibson*, Ky. (54 S. W. Rep. 945; 21 Ky. Law Rep. 1338). Construing and applying Ga. Civ. Code, §§ 2827, 2828, 5912, providing for the allowance of a homestead exemption to one who has "the care and support of dependent females," it is held that in order for an adult person to be the beneficiary of a homestead solely upon the ground of being a dependent female, this dependency must be upon the person who owns the property sought to be exempted, and the application for such exemption must be made by the owner himself. *Sutton v. Rosser*, 109 Ga. 204 (34 S. E. Rep. 346; 77 Am. St. Rep. 367). A childless wife to whom lands occupied by her and her husband as a homestead are conveyed, upon the granting of a divorce to her from her husband, in pursuance of an agreement between them, does not acquire any homestead rights therein prior to her subsequent marriage by her occupancy of such land, the statute (Ia. Code 1873, § 1989) in reference to the rights of a widow or widower with or without children in the homestead having no application. *Clemans v. Penfield*, 111 Ia. 511 (82 N. W. Rep. 947).

**Sec. 351. Who may claim homestead as "head of a family."** A widow with whom resides her children and grandchildren, who are under her care and maintenance, is the "head of a family" so as to be entitled to claim a homestead exemption as such. *Chamberlain Banking House v. Zutavern*, 59 Neb. 623 (81 N. W. Rep. 858). The statutory homestead or exemption provided for by Ga. Civ.



Code, § 2866, can be claimed only by one who is the head of a family and in property belonging to the head of the family; and a wife living with her husband and children is not the head of a family. *Bennett v. Trust Co. of Georgia*, 106 Ga. 578 (32 S. E. Rep. 625). An unmarried man living on his own land and in his own house with his mother and brothers and sisters, and contributing to their support, is the head of a family within the meaning of the homestead law of Missouri. *Broyles v. Cox*, 153 Mo. 242 (54 S. W. Rep. 488; 77 Am. St. Rep. 714). A son who devotes his entire earnings and the rents of real estate to the support of himself and his widowed mother is the head of a family, within the meaning of the constitution of South Carolina, *Scott v. Mosely*, 54 S. C. 375 (32 S. E. Rep. 450). A person is the "head of a family" within the meaning of Utah Rev. Stat. 1898, §§ 1147, 1154, where his mother resides with him and is under his care and maintenance. *Bunker v. Coons*, 21 Utah, 164 (60 Pac. Rep. 549).

In order for one to claim a homestead under Okla. Stat. 1893, § 2844, as "the head of a family" he must show that there are more than himself who together form the family and who are legally dependent upon him and whom he is legally obliged to care for. *Betts v. Mills*, 8 Okla. 351 (58 Pac. Rep. 957). The court say: "In order to constitute a family, there must be an obligation upon the head of the house to support the others, or some of them, and on their part a corresponding state of dependency. *Greenwood v. Maddox*, 27 Ark. 648; *Harbison v. Vaughan*, 42 Ark. 539. It is not sufficient that the applicant is the supporter of a family. He must be supporting those whom he is legally obliged to care for, and it has been expressly held that one who has a housekeeper, yet has no family except servants, is not such a head of a family as is contemplated in the homestead laws. *Dendy v. Gamble*, 64 Ga. 528. And in Illinois it was held that the essential requisite was that there be a family as beneficiaries of the law. And it was declared in *Rock v. Haas*, 110 Ill. 528, that under the homestead act of that state a family is a collection of persons living together; hence one person cannot constitute a family. *Kitchell v. Burgwin*, 21 Ill. 40; *Deere v. Chapman*, 25 Ill. 612 (79 Am. Dec. 351). A family is defined to be 'the collective body of persons who live in one

house, and under one head or manager; a household, including parents, children, and servants,' or as 'the group comprising the husband and wife and their dependent children.' Webst. Int. Dict. And it has been again defined as the collective body of persons who form one household, under one head and one domestic government, including children and servants, and, as sometimes used, even lodgers or boarders; and further as 'parents, with their children, whether they dwell together or not.' Cent. Dict. And it was said in *Zimmerman v. Franke*, 34 Kan. 654 (9 Pac. Rep. 750), that 'the word "family," as used in the exemption laws, we think, embraces a collective body of persons, generally relatives and servants—a household living together in one house or curtilage,—and does not embrace separate individuals who have no common home.'

**Sec. 352. In what lands a homestead may be claimed.** A husband's estate by curtesy upon the death of his wife is sufficient possessory interest to support a homestead claim. *White Sewing-Machine Co. v. Wooster*, 66 Ark. 382 (50 S. W. Rep. 1000; 74 Am. St. Rep. 100). In Michigan it is held that a tenant in common may have the benefit of a homestead in lands held in common, *Lawrence v. Morse*, 122 Mich. 269 (80 N. W. Rep. 1087); but in Tennessee it is held that a homestead does not attach to undivided interests in land, *Adcock v. Adcock*, 104 Tenn. 154 (56 S. W. Rep. 844). Under Neb. Comp. Stat., ch. 36, § 2, a husband cannot acquire a homestead in the separate property of his wife except with her consent; and this inchoate right becomes completely divested on the granting to her of a decree of divorce. *Klamp v. Klamp*, 58 Neb. 748 (79 N. W. Rep. 735). Construing and applying S. C. Const. 1868, art 2, § 32, providing that "the dwelling house, outbuildings and lands appurtenant" shall constitute a homestead, it is held that where the title to the tract of land upon which is situated the family residence is in the wife, the homestead cannot be extended to include an adjoining tract as appurtenant, the title to which is in her husband. *McClenaghan v. McEachern*, 56 S. C. 350 (34 S. E. Rep. 627).

**Sec. 353. Occupancy and use necessary.** Entry upon and staying in the house over nights made by a tenant in common immediately upon the vesting of the title in him was held a sufficient occupancy to give him a right to a homestead therein, though his family remained elsewhere. *Lawrence v. Morse*, 122 Mich. 269 (80 N. W. Rep. 1087). Actual residence upon land by one is not necessary in order to entitle him to claim a homestead exemption thereunder as the head of a family under Utah Rev. Stat. 1898, §§ 1147, 1154. *Bunker v. Coons*, 21 Utah 164 (60 Pac. Rep. 549). In Missouri actual occupancy of land as the head of a family is necessary to create the right of a homestead therein; the mere intention of one who has become the head of a family while residing away from the land to return to it to live is not sufficient. *St. Louis Brewing Ass'n v. Howard*, 150 Mo. 445 (51 S. W. Rep. 1046). In Vermont the right of homestead in buildings on the claimant's homestead lot does not extend to buildings leased by him to others or to buildings occupied by him for other than homestead purposes. *Thorp v. Wilbur*, 71 Vt. 266 (44 Atl. Rep. 339). Where noncontiguous lands are claimed as a homestead, under Ia. Code 1873, §§ 1995, 1996, it must be shown that they are habitually and in good faith used as a part of the same homestead. *Kelley v. Williams*, 110 Ia. 153 (81 N. W. Rep. 230). Particular occupancy of land as a home by a widower held sufficient to preserve his right to a homestead therein. *Commercial Bank & T. Co. v. Tacker*, Tenn. (52 S. W. Rep. 714).

**Sec. 354. Amount of land claimed.** In Illinois one may claim a homestead to the extent and value of \$1,000, and a homestead claim extends to the whole of the lot of land and buildings thereon occupied as a residence by the claimant, although it covers separate legal tracts or lots in which he has a different estate or interest. *Kilmer v. Garlick*, 185 Ill. 406 (56 N. E. Rep. 1103). Where a later statutory provision increases the value of property which one may claim as a homestead, one to whom a homestead has been allotted under a former statute may have such homestead supplemented and increased to the amount not exceeding that provided by the later statute. *Johnson v. Redwine*, 105 Ga. 449 (33 S. E. Rep. 676). In making

an assignment of a homestead to one claiming a life estate in lands it should be made upon the basis of the value of the interest in the land, and not upon the value of the land itself. S. C. Const., art 3, § 28; 22 Stat. at Large, p. 190, construed and applied. *Bank of Columbia v. Gibbes*, 54 S. C. 579 (32 S. E. Rep. 690). In determining whether land conveyed exceeds in value the homestead to which the grantor is entitled to claim free from debts, its value at the time of the transfer is to be taken and the incumbrances on the property deducted therefrom. *Kilmer v. Garlick*, 185 Ill. 406 (56 N. E. Rep. 1103). In South Carolina it is held that in determining whether an allotted homestead has increased over the value of the statutory limit, it is immaterial whether the increase has come in the market or intrinsic value thereof. *McCaskill v. McKinnon*, 125 N. C. 179 (34 S. E. Rep. 273).

**Sec. 355. Selection, allotment and declaration of homestead.** Cal. Civ. Code, §§ 1237, 1263 construed and applied—requisites of declaration of homestead. *Reid v. Englehart-Davidson Mercantile Co.*, 126 Cal. 527 (58 Pac. Rep. 1063; 77 Am. St. Rep. 206). Ga. Civ. Code, § 2866 et seq. construed and applied—right of wife to claim homestead when her husband refuses to do so—filing schedule. *Davis v. Lumpkin*, 106 Ga. 582 (32 S. E. Rep. 626). Ga. Civ. Code, § 2866, et seq. construed and applied—proceedings for setting apart homestead—collateral attack. *Marcrum v. Washington*, 109 Ga. 296 (34 S. E. Rep. 585). In Kansas, a debtor who owns and occupies 240 acres of land lying in a body, from whatever source obtained, or by whatever title or tenure it is held, is entitled to select 160 acres of the same as his homestead from any of the subdivisions thereof which are contiguous and will include the one upon which he resides. Unless he has already made a selection, he may make one when the execution is levied by the officer, or at any time before the sale of the property levied upon; and the bringing of a proceeding against the officer to enjoin the sale as soon as the levy is made, in which he sets up his claim of homestead, and the causing of a summons to be served upon the officer, is a sufficient notice to such officer of his homestead selection and claim. *Ard v. Pratt*, 61 Kan. 775 (60 Pac. Rep. 1048). The levy

upon and sale of the excess of a homestead claim over the statutory limit is void, under Mo. Rev. Stat., § 2690, where the homestead claimant was not notified of his homestead rights by the sheriff before the sale, and given an opportunity of selecting the part he would retain as a homestead, and no part was set off to him by the commissioners appointed by the sheriff to do so before the sale. *Creech v. Childers*, 156 Mo. 338 (56 S. W. Rep. 1106). Where a statute (Mont. Civ. Code, §§ 1670, 1693, 1701) limits the area of a homestead when selected within a town plat, city or village, and requires the claimant's declaration to describe the premises he selects, but contains no provision by which, after the homestead once has been selected, there can be a re-adjustment of the area, and the surplus taken by the creditor, it is held that an inadvertent inclusion in a declaration of homestead of one-sixth more land than the statute allows invalidates the claimant's entire claim. *Yerrick v. Higgins*, 22 Mont. 502 (57 Pac. Rep. 95). Mont. Civ. Code 1895, §§ 1701, 1703 construed and applied—contents of declaration of homestead—effect of including lands exceeding in value the statutory limit. *Vincent v. Vineyard*, 24 Mont. 207 (61 Pac. Rep. 131). While, by the statutes of Nebraska, the husband is described as the head of the family, or the person who may take the necessary steps to protect the homestead from forced sale, he is not thereby given the exclusive dominion over the homestead or the right to the proceeds and profits derived therefrom, when the property is the separate property of the wife. *Klump v. Klump*, 58 Neb. 748 (79 N. W. Rep. 735). S. C. Rev. Stat. 1893, §§ 2126, 2127 construed and applied—return of appraisement of debtor's homestead—filing exceptions. *Ex parte Ransey*, 54 S. C. 517 (32 S. E. Rep. 522). Shannon's Tenn. Code, § 3804 construed and applied—setting apart homestead by officer to head of family when land is levied upon. *Delk v. Yelton*, 103 Tenn. 476 (53 S. W. Rep. 729). Tex. Rev. Stat., § 2403 construed and applied—selection of homestead by head of a family out of a larger tract of land. *Affleck v. Wangemann*, 93 Tex. 351 (55 S. W. Rep. 312). For exhaustive note on "Revaluation or reassignment of homestead for appreciation or depreciation in value," see 44 L. R. A. 400-402.

**Sec. 356. Exemption of homestead from debts.** A homestead, to the extent of the statutory limitation, is not subject to judgment liens against the holder thereof, and his vendee takes free from such liens. *Kilmer v. Garlick*, 185 Ill. 406 (56 N. E. Rep. 1103). In Missouri the purchaser of a portion of a homestead levied on and sold during the lifetime of the owner, under an execution based on a general judgment against him, obtains no title by virtue of such sale. *Creech v. Childers*, 156 Mo. 338 (56 S. W. Rep. 1106). Cal. Civ. Code, § 1241, subd. 4 construed and applied—priority of homestead claim over mortgage. *Campan v. Molle*, 124 Cal. 415 (57 Pac. Rep. 208). S. Dak. Laws 1890, ch. 86 bestows upon every owner of a homestead absolute immunity from a sale thereof in satisfaction of debts, even though contracted for the purchase price. *Northwestern Loan & Banking Co. v. Jonasen*, 11 S. Dak. 566 (79 N. W. Rep. 840). Under Wis. Rev. Stat., § 2271 the right to enforce a vendor's lien upon a homestead is lost by the death of the owner of such homestead. *Berger v. Berger*, 104 Wis. 282 (80 N. W. Rep. 585; 76 Am. St. Rep. 877).

**Sec. 357. Exemption of homestead insurance money—Liability for debt incurred for borrowed purchase money.** The proceeds of an insurance policy on a homestead are exempt the same as the homestead, *Wright v. Brooks*, 101 Tenn. 601 (49 S. W. Rep. 828), citing numerous authorities; and the same is true of property purchased with the proceeds of insurance on a homestead, *Rulo v. Murphy*, Ky. (51 S. W. Rep. 312; 21 Ky. Law Rep. 295); but where a statute (Ark. Const. art 9, §3) makes a homestead liable to sale under a judgment for the purchase price thereof, insurance money arising from a policy of insurance on a homestead may be subjected to the payment of a debt incurred for money borrowed to buy the homestead. *Acruman v. Barnes*, 66 Ark. 442 (51 S. W. Rep. 319; 74 Am. St. Rep. 104). The court say: "In some courts it is held that money loaned to purchase property cannot be considered purchase money as between the lender and borrower, but only between the vendor and purchaser of the property. *Heuisler v. Nickum*, 38 Md. 270. But, in our opinion, the weight of authority

and the better reason is that money borrowed of a third person, with which to purchase a homestead, when it is understood between the lender and the borrower that it is to be used for that purpose, and it is so used, is purchase money. *Allen v. Hawley*, 66 Ill. 164; *Hamrick v. Bank*, 54 Ga. 502; *Carr v. Caldwell*, 10 Cal. 385 (70 Am. Dec. 740); *Nichols v. Overacker*, 16 Kan. 54. 'Things bought with borrowed money, borrowed with the avowed purpose of buying them, are not exempt as against the lender.' *Waples*, Homest. 911; *Houlehan v. Rassler*, 73 Wis. 557 (41 N. W. Rep. 720). 'The homestead is liable for money borrowed to pay a balance due on the purchase price.' *White v. Wheelan*, 71 Ga. 533; *Middlebrooks v. Warren*, 59 Ga. 232. 'One who loans money to enable another to purchase a homestead cannot be defeated in collecting it by the claim of homestead immunity on the part of the borrower.' *Warhmund v. Merritt*, 60 Tex. 24; *Eyler v. Eyler*, 60 Tex. 315. The insurance money due the appellee in this case was not exempt from the debt due the appellant for the \$1,000 loaned him by the appellant, with which to purchase the homestead, for the loss of which the insurance money was due the appellee. The money loaned, under the circumstances, was purchase money, according to the authorities; wherefore the decree of the chancellor holding that the money is exempt is erroneous."

**Sec. 358. Debts for which a homestead is liable.** A judgment for damages for the use and detention of land by one in possession under a naked legal title rendered in favor of the holder of a superior equitable title is for a tort, and hence a claim of exemptions cannot prevail against it. *Hardy v. Gunn*, 122 Ala. 666 (25 So. Rep. 621; 45 L. R. A. 804). Under the constitution of Arkansas a homestead exemption cannot be claimed against a debt for trust funds, and a homestead in the hands of an administrator may be subjected to payment of his decedent's debts of this character. *Huffstedler v. Kibler*, 67 Ark. 239 (54 S. W. Rep. 210). A wife's right of homestead in property belonging to her husband is subject to a mortgage thereon given by him before their marriage. *Browneller v. Wells*, 109 Ia. 230 (80 N. W. Rep. 351). Where a mortgagee released his mortgage in consideration of his mortgagor's

agreement to make partial payment of the debt and secure the remainder by a mortgage on other land, the mortgagor afterwards cannot remove upon the other land and assert a homestead therein so as to defeat the payment of the balance of the mortgage debt. *King v. Williams*, 66 Ark. 333 (50 S. W. Rep. 695). Under Cal. Civ. Code, § 1241, a homestead is liable for "debts secured by mortgages upon the premises executed and recorded before the declaration of homestead was filed for record," although at the time of their execution the premises were resided upon as a homestead. *Bank of Woodland v. Oberhaus*, 125 Cal. 320 (57 Pac. Rep. 1070). Ky. Stat., § 1702, subjecting land claimed as a homestead to debts existing prior to its "purchase," does not apply to a homestead inherited by a debtor after the creation of the debt, *Hester v. Linn*, Ky. (49 S. W. Rep. 431; 20 Ky. Law Rep. 1460); and one to whom land descends has a reasonable time after he thus acquires an interest in it to move upon it and claim a homestead therein, *Spratt v. Allen*, Ky. (50 S. W. Rep. 270; 20 Ky. Law Rep. 1822). The right to a homestead exemption in lands thus acquired extends to other lands to the extent they are purchased with the proceeds of the lands acquired by descent. *McDonald v. Lowry*, Ky. (50 S. W. Rep. 553; 20 Ky. Law Rep. 1939). The liability incurred by one on a covenant of warranty in a deed executed by him will be considered as created as of the date of the deed in determining his right to claim a homestead exemption in lands subsequently acquired by him, under Ky. Stat., § 1702, providing that such an exemption "shall not apply to sales under execution, attachment or judgment, if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements thereon." *Benge's Adm'r v. Bowling*, Ky. (51 S. W. Rep. 151; 21 Ky. Law Rep. 165). The exemption given by Mo. Rev. Stat. 1889, § 4906, applies only to property owned by the head of a family, as against a claim of third persons, and cannot be invoked by an heir to except his interest in real estate, as against a debt he owes the estate. *Duffy v. Duffy*, 155 Mo. 144 (55 S. W. Rep. 1002). Mont. Civ. Code 1895, § 1674 construed and applied—judgments to which a homestead is liable. *Vincent v. Vineyard*, 24 Mont. 207 (61 Pac. Rep. 131). S. C. Const.



1868, art. 2, § 32; 1 Rev. Stat., § 2133 construed and applied—liability of products of homestead to attachment to pay obligations contracted in their production. *Berry v. Berry*, 55 S. C. 303 (33 S. E. Rep. 363). S. C. Const., art. 2, § 32; 1 Rev. Stat., § 2133 construed and applied—execution against homestead—duty of court to certify that the judgment is for purchase money. *Willingham v. Willingham*, 55 S. C. 441 (33 S. E. Rep. 500).

**Sec. 359. Conclusiveness of judgment denying right of homestead.** A homestead estate is in the nature of a trust estate, of which the head of the family is the trustee; and a judgment rendered in a suit brought against the head of the family as such, seeking to subject the homestead estate to the payment of a debt alleged to belong to the class of debts for the payment of which the homestead could be rendered liable, will be binding upon the beneficiaries of the homestead, although they are not parties to the action, *Wegman Piano Co. v. Irvine*, 107 Ga. 65 (32 S. E. Rep. 898; 73 Am. St. Rep. 109); and the title of a purchaser at a sale made under proceedings on a mortgage, in which such a judgment was rendered, is not affected by the homestead claimant subsequently establishing the contents of lost papers showing the existence of his homestead right before the mortgage was given, *Cosnahan v. Johnston*, 108 Ga. 235 (33 S. E. Rep. 847; 75 Am. St. Rep. 36).

**Sec. 360. Abandonment, loss or waiver of homestead.** One who has acquired the right of a homestead as a house-keeper and the head of a family does not lose this right by the subsequent loss of his family by death or marriage, *Collins v. Gibson*, Ky. (54 S. W. Rep. 945; 21 Ky. Law Rep. 1338); nor does a wife lose her homestead rights by her husband abandoning her or by his surrender of the contract under which they claim title, *Gardner v. Gardner*, 123 Mich. 673 (82 N. W. Rep. 522). A right to claim a homestead which is dependent upon the claimant redeeming the premises from a mortgage is barred, where he does not offer to make the redemption within the time allowed. *Richardson v. Baker*, 68 N. H. 297 (44 Atl. Rep. 520). For particular cases in which an abandonment of a homestead is held to be shown, see *Smith v. Kidd*, 123

Mich. 193 (81 N. W. Rep. 1092); *Gist v. Lucas*, 122 Ala. 557 (25 So. Rep. 41); *Land v. Boykin*, 122 Ala. 627 (25 So. Rep. 172). Particular facts held insufficient to show an abandonment of a homestead. *Gardner v. Gardner*, 123 Mich. 673 (82 N. W. Rep. 522); *Bealey v. Blake*, 153 Mo. 657 (55 S. W. Rep. 288).

**Sec. 361. Abandonment of homestead by conveyance or removal.** A husband and wife cannot claim a homestead in lands occupied by them as such, where, subsequent to an attachment of the property, but prior to execution, they convey it by deed with release of dower and homestead and remove from the premises. *Beland v. Gross*, 68 N. H. 257 (44 Atl. Rep. 387). Temporary absence from a homestead with intention of returning does not constitute an abandonment. *Lynn v. Sentel*, 183 Ill. 382 (55 N. E. Rep. 838; 75 Am. St. Rep. 110). Temporary absence of the homestead claimant from his residence while out of the state for a year or two at a time earning money to assist in providing for his family, does not constitute abandonment, when there is shown a bona fide intention to return, build a house, and reside on the land. *Bunker v. Coons*, 21 Utah 164 (60 Pac. Rep. 549). An owner of property occupied as a homestead, who has under consideration a change of residence, and who, with his wife, starts out in an effort to find a new home, but with the intention to return and continue to occupy the homestead if he cannot make a satisfactory exchange, and who leaves members of the family at the home, as well as household effects, stock, and other property, does not thereby forfeit his homestead right; nor will the property be divested of the homestead character until there is a permanent removal, with an intention not to return to the same. *Palmer Oil & Gas Co. v. Parish*, 61 Kan. 311 (59 Pac. Rep. 640). An owner of farm lands claimed as a homestead does not lose his homestead therein by removal therefrom to a town for the purpose of educating his children, although he votes in the town, where part of his household goods remain on the farm to which he has a fixed intention of returning. *Cincinnati Leaf Tobacco Warehouse Co. v. Thompson*, Ky. (49 S. W. Rep. 446; 20 Ky. Law Rep. 1439).

**Sec. 362. Waiver of homestead by stipulation in contract creating indebtedness.** The right of the head of a family to claim a homestead, under Utah Rev. Stat. 1898, §§ 1147, 1154, cannot be waived by him by a stipulation to that effect in his contract creating an indebtedness. *Bunker v. Coons*, 21 Utah 164 (60 Pac. Rep. 549). The court say: "In Wap. Homest. p. 538, it is said: 'Rights of defense when life, liberty or property are assailed cannot be denied by courts because they have been relinquished anterior to the time of attack. Rights not only natural, but legal, which are given for defense, cannot be abjured by the beneficiary so as to deprive courts of the power to enforce them when subsequently pleaded. Remedies conferred by law cannot be waived by mere agreement not to claim them, so as to devert courts of the duty of according them if they be afterwards claimed by one of the contracting parties.' So, on page 546, he says: 'No such act on the part of the husband or father, or of a wife or widow, or of any person, as might estop him or her personally from claiming a homestead right, can possibly debar others, who have rights therein, from their interest. Such rights of others render his own inviolable, since they are inseparable from his. What might be an act in pais, operating as an estoppel, were he alone concerned, would not be such when the rights of those to be protected through him are involved. He would not be estopped from claiming homestead, though he had solemnly promised not to claim, and had received a consideration equivalent to value of his right.' Following these principles, it is generally held that the right to claim either real or personal property as the law exempts cannot be waived by a general waiver in an executory contract. The taking away of the right to surrender future protection under exemption laws is based upon public policy and the probable needs of the family, the improvidence of many people when making contracts to be performed in the future, the danger of the weak being overreached by the strong, the interest of the state in preventing pauperism, and the necessity of guarding the impecunious from their own want of caution when releasing rights before the occasion of asserting them arises. In our opinion, the homestead right, when vested in the head of a family, as guaranteed by the constitution

and laws of this state, is not a right to the husband or other head of the family for their protection alone, but it is as well bestowed upon those enumerated in the statute as members of his household and under his care, protection and maintenance, while the statutory relation exists. It was intended to secure and protect the home as such, not only against creditors, but as against every act on the part of the head of the family not authorized by law, by which he could, in advance, barter away the right to the homestead, and thereby sacrifice the home as against himself and those constituting his family and under his care and maintenance. Therefore no waiver of the homestead right, as contained in the contract offered in evidence, could affect the right of the head of the family, or those under his care and maintenance as members of his legal household. To uphold such a contract would be against public policy."

**Sec. 363. Conveyance and incumbrance of homestead.**

A homestead right cannot be transmitted by will, *Roots v. Robertson*, 93 Tex. 365 (55 S. W. Rep. 308); but in Kentucky a debtor, by will, may invest his wife with title to his homestead free from the claims of his creditors, *Schonbachler v. Schonbachler*, Ky. (57 S. W. Rep. 232). A homestead allotted by metes and bounds to an execution debtor on a sale of his property which is made subject to the homestead, may be sold and conveyed by him so as to give his grantee the right thereto until the homestead terminates. *Briscoe v. Vaughan*, 103 Tenn. 308 (52 S. W. Rep. 1068). A void mortgage on a homestead is not validated by a subsequent abandonment of the property as a homestead. *Woeltz v. Woeltz*, Tex. Civ. App. (57 S. W. Rep. 905). A conveyance of a homestead invalid on account of wife's defective acknowledgment may be validated by a statute curing defective acknowledgments, *Williamson v. Lazarus*, 66 Ark. 226 (49 S. W. Rep. 974; 74 Am. St. Rep. 91); and Ark. Laws, Act Apr. 13, 1893 (Sand. & H. Dig., § 743), validates conveyances of homestead previously executed which were invalid on account of the wife not joining in the execution, as required by Act Mar. 18, 1887 (Sand & H. Dig., § 3713), *Alkire Grocery Co. v. Jackson*, 66 Ark. 455 (51 S. W. Rep. 459). Ala. Code 1876, § 2822 construed and applied—separate acknowl-

edgment by married woman of conveyance of homestead. *Hayes v. Southern Home Bldg. & L. Ass'n*, 124 Ala. 663 (26 So. Rep. 527). Cal. Stat. 1873-74, p. 582 construed and applied—alienation of homestead in case of insanity of husband or wife. *Jones v. Falvella*, 126 Cal. 24 (58 Pac. Rep. 311). Construing and applying Mich. Comp. Laws 1897, § 10363, providing that the homestead right may be cut off by "a mortgage or other alienation of the land, signed by the wife," it is held that her homestead rights in lands held by her husband under a contract of purchase may be cut off by a written instrument signed by them directing the vendor to convey to another. *Stephens v. Leonard*, 122 Mich. 125 (80 N. W. Rep. 1002). One who takes a mortgage upon land purchased with the proceeds of exempted property, and who knows, or is chargeable with notice, that such was the fact, acquires his lien subject to the exemption right. *Johnson v. Redwine*, 105 Ga. 449 (33 S. E. Rep. 676).

**Sec. 364. Conveyance and incumbrance of homestead—Necessity of joint conveyance of husband and wife.** Construing and applying Okla. Stat. 1893, ch. 21, § 21, providing that "all instruments other than leases for a period of more than one year, affecting the title to realty occupied as the homestead of the family, shall be void, unless the husband and wife join in the execution and acknowledge the instrument conveying the same," it is held that a mortgage upon land claimed to be a homestead of the family not signed by the wife is void for all purposes, from its inception, and is not validated by the abandonment of the homestead; but the husband may convey the homestead directly to his wife without her joining in the conveyance. *Hall v. Powell*, 8 Okla. 276 (57 Pac. Rep. 168). Ariz. Comp. Laws, § 2141, providing that no alienation of the homestead by the owner thereof, if a married man, shall be valid without the signature of the wife to the same, does not apply to a conveyance made by the husband directly to the wife. *Luhrs v. Hancock*, Ariz. (57 Pac. Rep. 605). Citing, *Lynch v. Doran*, 95 Mich. 395 (54 N. W. Rep. 882); *Harsh v. Griffin*, 72 Ia. 608 (34 N. W. Rep. 441); *Burkett v. Burkett*, 78 Cal. 310 (20 Pac. Rep. 715); *Furrow v. Athey*, 21 Neb. 671 (33 N. W. Rep. 208);

59 Am. Rep. 867); *Albright v. Albright*, 70 Wis. 528 (36 N. W. Rep. 254). A statute (Ark. Act, Mar. 18, 1887; Sand. & H. Dig., § 3713) making a wife's joinder in and acknowledgment of her husband's conveyance of a homestead essential to its validity, does not affect in any manner or restrict his right to abandon the homestead, and thereby make it subject to alienation without her concurrence. *Farmers' Sav., Bldg. & L. Ass'n, v. Jones*, 68 Ark. 76 (56 S. W. Rep. 1062). Citing, *Thompson, Homest. & Ex.* §§ 42, 276, 483; *Titman v. Moore*, 43 Ill. 169, 174, et seq.; *Guiod v. Guiod*, 14 Cal. 506 (76 Am. Dec. 440); *Thoms v. Thoms*, 45 Miss. 263, 276; *Story, Confl. Laws*; *Williams v. Swetland*, 10 Ia. 51. Sand. & H. Ark. Dig., § 3713, excepting purchase money mortgages on a homestead from those in the execution of which the mortgagor's wife must join, extends to a mortgage given by a purchaser of land to a third person to secure money advanced by him for the payment of other mortgages which such purchaser had agreed with his vendor to pay as a part of the purchase price. *Farnsworth v. Hoover*, 66 Ark. 367 (50 S. W. Rep. 865). A conveyance of the homestead without the signature of the wife is void, *Wittkowsky v. Gidney*, 124 N. C. 437 (32 S. E. Rep. 731), construing and applying Const., art. 10, § 8; *Cumps v. Kiyō*, 104 Wis. 656 (80 N. W. Rep. 937), construing and applying Rev. Stat., § 2203. The same is held in Michigan, *Francis v. Francis*, 122 Mich. 10 (80 N. W. Rep. 795); although the same deed conveys the land in trust and provides for the use of the premises by or for the benefit of the wife and children, and an ultimate division of the land and its proceeds among the survivors of them. *Sirr v. Miller*, 121 Mich. 598 (80 N. W. Rep. 580). Under Neb. Comp. Stat. 1897, ch. 36, § 4, the homestead of a married person cannot be conveyed or incumbered except by an instrument executed and acknowledged by both husband and wife. *Council Bluffs Sav. Bank v. Smith*, 59 Neb. 90 (80 N. W. Rep. 270; 80 Am. St. Rep. 669). Under Cal. Civ. Code, § 1242 providing that "a homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both the husband and the wife," it is held that a mortgage upon the homestead executed, acknowledged and delivered by the

wife alone is absolutely void, and is not validated by her husband several months thereafter executing and acknowledging a declaration on the mortgage that he concurred in its execution as of the date of its execution. The statute requires that such conveyance be executed by both parties jointly and concurrently in one instrument. *Hart v. Church*, 126 Cal. 471 (58 Pac. Rep. 910; 77 Am. St. Rep. 195). A husband who absents himself from his wife and family for the purpose of finding employment whereby he may better provide for them and with the intention of returning, leaving them residing on a homestead belonging to her, is still "living with his wife" within the meaning of Miss. Code 1892, § 1985, requiring a conveyance of a homestead owned by the wife to be signed and acknowledged by her and her husband "if he be living with his wife." *Walton v. Walton*, 76 Miss. 662 (25 So. Rep. 166; 71 Am. St. Rep. 540). A lease of a homestead giving the lessees the right to enter upon the land and operate for oil, gas and minerals for a term of ten years, contemplates such an occupancy as so far interferes with the use of the homestead that the joint consent of the husband and wife is necessary to its validity. *Palmer Oil & Gas Co. v. Parish*, 61 Kan. 311 (59 Pac. Rep. 640).

**Sec. 365. Power of husband to extend duration of mortgage lien on homestead.** The husband, without the consent of his wife, by contract with the mortgagee, cannot extend the duration of a mortgage lien upon their homestead beyond its original term. *Hardman v. Portsmouth Sav. Bank*, Kan. App. (61 Pac. Rep. 984). The court say: "The question is, could the husband, by his contract alone, enlarge the scope of the mortgage, and continue the lien thereunder? We are of the opinion that this question was decided by the supreme court in the negative in *Jenkins v. Simmons*, 37 Kan. 508 (15 Pac. Rep. 529). After referring to many of the cases upon the question, the opinion concludes: 'The logic of all these cases is that no act of the husband alone, can create, extend, postpone or renew a lien upon the homestead without the written consent of the wife in the exact manner prescribed.' In the body of the opinion there is a lengthy quotation from the case of *Barber v. Babel*, 36 Cal. 11, which directly de-

cides this question. It is as follows: 'The giving of a new note, and the extending of the time of payment were also the act of the husband alone, to which the wife was no party. Under the authorities cited, he could no more indirectly in this mode effect the same purpose by continuing the old loan beyond the time when the action would be barred as to the wife than in the direct mode of executing a new mortgage and discharging the old.' This case is cited in support of the conclusion reached by the court, quoted above. See, also, *Smyth, Homest.* § 271; *Dunn v. Buckley*, 56 Wis. 190 (14 N. W. Rep. 67); *Campbell v. Babcock*, 27 Wis. 512; *Smith v. Scherck*, 60 Miss. 491."

**Sec. 366. Rights of surviving husband, wife or children.** A homestead in the hands of an administrator may be subjected to the payment of a debt due from his decedent for trust funds, *Huffstedler v. Kibler*, 67 Ark. 239 (54 S. W. Rep. 210); but the homestead rights of a widow and minor children of a decedent cannot be disturbed by a sale of the property to pay a debt for which it could not have been sold during his lifetime, *Broyles v. Cox*, 153 Mo. 242 (54 S. W. Rep. 488; 77 Am. St. Rep. 714); *In re Powell's Estate*, 157 Mo. 151 (47 S. W. Rep. 717). A wife who has joined with her husband in the execution of a trust deed on lands cannot subsequently assert the homestead rights of a widow against a sale under the deed. *Markwell v. Markwell*, 157 Mo. 326 (57 S. W. Rep. 1078). A widow to whom a homestead is assigned may convey her right in the property without working a forfeiture. *Cowan v. Carson*, 101 Tenn. 523 (50 S. W. Rep. 742). The right of infant children to occupy the homestead of a decedent cannot be defeated by the widow's conveyance thereof, *Deboe v. Rushing*, Ky. (51 S. W. Rep. 613; 21 Ky. Law. Rep. 423); but in Illinois a release by a widow of her homestead rights in her husband's real estate operates to bar both her and her children from thereafter asserting homestead rights, *Robb v. Howell*, 180 Ill. 177 (54 N. E. Rep. 324). The conveyance of a child's interest in a probate homestead does not make the grantee therein a tenant in common with the other holders of the homestead so as to entitle him as such to share in the possession



thereof. *Moore v. Hoffman*, 125 Cal. 90 (57 Pac. Rep. 769; 73 Am. St. Rep. 27). A husband's continued occupancy as a homestead of land purchased by him and conveyed to his wife, for nine years after her death until his death, amounts to an election on his part to hold the land as a homestead for life, the title passing to her heirs upon his death. *McGuire v. McGuire*, Ia. (81 N. W. Rep. 451). A debtor, by will, may invest his wife with title to his homestead free from the claims of his creditors. *Schönbachler v. Schanbachler*, Ky. (57 S. W. Rep. 232). A widow does not lose her homestead right in land by failing to make a formal dissent to her husband's will devising the land to her during her widowhood. *Mason v. Jackson*, Tenn. (57 S. W. Rep. 217). A widow does not lose the homestead rights given her by Mich. Const., art. 16, § 4 by her election to take under her husband's will which bars her from claiming dower in his estate. *Koster v. Gellen*, 124 Mich. 149 (82 N. W. Rep. 823). A widow who does not renounce the provisions of her husband's will devising to her all his estate subject to the payment of his debts, cannot claim the homestead as against his creditors; but the homestead rights of infant children are not affected. *Guffy, J.*, dissents from the first proposition. *Schnabel v. Schnabel's Ex'x*, Ky. (56 S. W. Rep. 983). The homestead rights of the minor children of the head of a family, under Tenn. Const., art. 11, § 11, are not affected by a direction in his will that he desired all his debts to be paid, and that his homestead should be sold if necessary for that purpose. *Macrae v. Macrae*, Tenn. (57 S. W. Rep. 423).

Ala. Laws 1884-85, p. 114 construed and applied—setting apart homestead to widow—estate taken by her. *Shamlin v. Hall*, 123 Ala. 541 (26 So. Rep. 285). A widow's homestead is determined by the law in force at the time of her husband's death. Ala. Laws 1886-87, p. 112, amending Laws 1884-85, p. 114; Code 1886, § 2543 construed and applied. *O'Rear v. Jackson*, 124 Ala. 298 (26 So. Rep. 944). Ala. Laws 1888-89, p. 113 construed and applied—nonforfeiture of homestead by removal of widow and minor children. *Gist v. Lucas*, 122 Ala. 557 (25 So. Rep. 41). Cal. Code Civ. Proc., § 1465 construed and applied—setting aside probate homestead—discretion of

court—insolvency of estate. In *re Adams' Estate*, 128 Cal. 380 (57 Pac. Rep. 569); *Adams v. Bank of Woodland*, 128 Cal. 380 (60 Pac. Rep. 965). Cal. Code Civ. Proc., §§ 1465, 1468 construed and applied—selection by court of homestead for surviving wife—descent upon her death. *Hardwick v. Black*, 128 Cal. 672 (61 Pac. Rep. 381). Cal. Code Civ. Proc., §§ 1475, 1544 construed and applied—setting off selected homestead to surviving spouse—liability for debts. In *re Huelsman's Estate*, 127 Cal. 275 (59 Pac. Rep. 776). The children of a deceased householder are not deprived of their right to continue the occupation of the homestead after his death during their minority, given by Ill. Rev. Stat. 1897, ch. 52, § 2, by the fact that they are living with their divorced mother, at the time of his death, who was deprived of any right in the homestead by the decree of divorce. *Walker v. Walker*, 181 Ill. 260 (54 N. E. Rep. 956). In Georgia it is held that a homestead allowed to a widow out of her husband's estate for the benefit of herself and minor beneficiaries ceases when the widow dies and the children arrive at majority. *Sutton v. Rosser*, 109 Ga. 204 (34 S. E. Rep. 346; 77 Am. St. Rep. 367). Minn. Gen. Stat., §§ 4469-4472 construed and applied—descent of homestead—election by widow. In *re Tracey's Estate*, 79 Minn. 267 (82 N. W. Rep. 635). N. C. Const., art. 10, § 3 construed and applied—exemption of homestead after death of owner thereof during minority of his children. *Bruton v. McRae*, 125 N. C. 206 (34 S. E. Rep. 397). S. C. Rev. Stat., § 2129 construed and applied—assignment of homestead in decedent's property—rights of surviving children. *Ex parte Worley*, 54 S. C. 208 (32 S. E. Rep. 307; 71 Am. St. Rep. 783). Construing and applying S. C. Rev. Stat. 1893, § 2130, providing that "no right of homestead shall exist or be allowed in any property, real or personal, aliened or mortgaged," it is held that a specific devise of the fee defeats the homestead right, *Beaty v. Richardson*, 56 S. C. 173 (34 S. E. Rep. 73; 46 L. R. A. 517); and children of an owner in fee of land to whom a homestead has been assigned therein, cannot assert a homestead right after his death against one to whom he has devised the land, *Bostick v. Chovin*, 55 S. C. 427 (33 S. E. Rep. 508). Construing and applying Tenn. Const., art. 11, § 11, providing that "a homestead in the posses-

sion of each head of a family \* \* \* shall be exempt during the life of such head of a family, ~~to~~ inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same," it is held that where one having a homestead in lands dies without leaving a widow, but leaves minor children, they are entitled to a homestead in his property, notwithstanding a stipulation in his will directing that all his property be sold for the payment of his debts. *McCrae v. McCrae*, 103 Tenn. 719 (54 S. W. Rep. 979). Only the widow and minor children of a head of a family can claim his homestead rights upon his decease, under Tex. Const., art. 16, § 52; Rev. Stat., §§ 2046, 2055, and such rights do not pass to the mother and sister of a decedent, although during his life they were dependent upon him and constituted his whole family. *Roots v. Robertson*, 93 Tex. 365 (55 S. W. Rep. 308). Tex. Rev. Stat., §§ 2046-2048 construed and applied—setting apart homestead for widow and minor children—allowance to widow in lieu of homestead. *Linares v. De Linares*, 93 Tex. 84 (53 S. W. Rep. 579). Tex. Rev. Stat., § 2053 construed and applied—setting aside homestead to surviving widow and children. *Ford v. Sims*, 93 Tex. 586 (57 S. W. Rep. 20).

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## HUSBAND AND WIFE

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### EPITOME OF CASES.

**Sec. 367. Antenuptial contracts.** An antenuptial contract providing that the wife shall acquire no interest in the husband's estate is binding, and marriage is a sufficient consideration for such a contract; but where such a contract is asserted as having been fraudulently procured by the husband the burden of sustaining it is upon him. *Fisher v. Koontz*, 110 Ia. 498 (80 N. W. Rep. 551). An antenuptial contract by which a wife agrees, in considera-

tion of a certain sum of money, to release all her interest in her husband's estate in order that it may pass by certain provisions of his will, with a covenant not to interfere in any way with the disposition of the property made by the will, will preclude her from contesting the right of the beneficiaries under the will on the ground that the will was revoked by the marriage—especially when she has ratified the contract after her husband's death by accepting the consideration agreed upon. And a woman's mere ignorance of the rule of law that marriage will revoke her intended husband's will is not sufficient to overturn such an antenuptial agreement. *Hudnall v. Ham*, 183 Ill. 486 (56 N. E. Rep. 172; 48 L. R. A. 557; 75 Am. St. Rep. 124). Particular antenuptial contract construed and held to give the wife the absolute control and disposal of her property and to bar the claim of her husband to any interest therein in case of his surviving her. *Dunlop v. Lamb*, 182 Ill. 319 (55 N. E. Rep. 354). For construction of particular antenuptial contract, see *Borland v. Welch*, 162 N. Y. 104 (56 N. E. Rep. 556).

**Sec. 368. Contracts and conveyances between husband and wife.** At common law marriage extinguished contractual relations between the parties, and this rule is not changed by the married women's statutes of Tennessee. *Schilling v. Darmody*, 102 Tenn. 439 (52 S. W. Rep. 291; 73 Am. St. Rep. 892). A postnuptial contract between a husband and wife, cancelling an antenuptial agreement between them in which she relinquished her marital rights in his estate, is not within the prohibition of Ia. Code, § 3154, providing that, "where property is owned by the husband or wife, the other has no interest therein which can be the subject of contract between them." Condonation by a wife of her husband's wrongs for which she has threatened to sue for divorce is not a sufficient consideration for such a postnuptial contract. *Fisher v. Koontz*, 110 Ia. 498 (80 N. W. Rep. 551). In Louisiana a voluntary conveyance by a wife to her husband of her separate real estate made through a third person will not be upheld. *Douglass v. Douglass*, 51 La. Ann. 1455 (26 So. Rep. 546).

**Sec. 369. Deeds of separation.** While a court of equity in New Jersey will not enforce a deed of separation between husband and wife, because against the policy of the laws of that state, yet the court will not suffer a husband who has become possessed of the property of his wife by virtue of such a deed to avail himself of his own wrong in order to free himself from the duty of maintaining his wife. *Buttlar v. Buttlar*, 57 N. J. Eq. 645 (42 Atl. Rep. 755; 73 Am. St. Rep. 648). An agreement between a husband and wife to live separate, containing a stipulation releasing the husband's right to curtesy in his wife's lands, may be asserted as a bar to a subsequent action by him to enforce such right, where there has been a complete performance of the agreement of separation, although it was not enforceable at law as such. *McBreen v. McBreen*, 154 Mo. 323 (55 S. W. Rep. 463; 77 Am. St. Rep. 758). When the relations between a husband and wife are such as to make a separation inevitable, or where the conduct of one is such as to render the separation necessary for the health and happiness of the other, a postnuptial agreement, reasonable and just in its provisions, for an immediate separation, the division and disposition of property, and the relinquishment by one of any claim or interest, actual or contingent, in the estate of the other by reason of the marital relation, is not contrary to public policy or illegal. Such an agreement, wherein the husband, for sufficient consideration, releases the wife and her estate from any claim or interest which he might have by reason of being her husband, effectually bars him from any share or interest in the property or estate left by his wife at her death. Where a separation is inevitable or absolutely necessary, an agreement for immediate separation will not be invalid because there was at the time of its execution an understanding between the parties that an early divorce would be obtained. *King v. Mollohan*, 61 Kan. 683 (60 Pac. Rep. 731). An agreement between a husband and wife providing for their separation to take place in the future, is void. *Bowers v. Hutchinson*, 67 Ark. 15 (53 S. W. Rep. 399). See opinion for collation of authorities on this subject.

**Sec. 370. Conveyances to husband and wife—Estates by entireties.** The common law rule of estates by entireties prevails in Arkansas and is not changed by the abolition of joint tenancies, nor by the act of the legislature enabling married women to acquire and hold property separate from their husbands. *Roulston v. Hall*, 66 Ark. 305 (50 S. W. Rep. 690; 74 Am. St. Rep. 97). See *Ballards' Law of Real Prop.*, Vol. I, §§ 238, 239. A statute (Ky. Stat., § 2348) abolishing the right of survivorship between joint tenants does not affect estates by entireties. *City of Louisville v. Coleburne*, Ky. (56 S. W. Rep. 681). A conveyance of lands by warranty deed to a husband and wife "jointly" creates an estate by entireties, and not a joint tenancy; and the word "jointly" will be treated as mere surplusage. *Simons v. Bollinger*, 154 Ind. 83 (56 N. E. Rep. 23; 48 L. R. A. 234). A conveyance of land to a husband and wife for and during their natural lives, with remainder in fee unto their child or children, if any there be left at their death, provides for a right by survivorship so as to create an estate by entireties in the husband and wife, under Ky. Stat., § 2143, providing "that if real estate be conveyed or devised to husband and wife, unless the right by survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them, but they shall take as tenants in common." *City of Louisville v. Coleburne*, Ky. (56 S. W. Rep. 681). A mortgage of the estate though executed by both husband and wife given to secure his individual debt, may be avoided by either of them. *Abicht v. Searls*, 154 Ind. 594 (57 N. E. Rep. 246).

**Sec. 371. Inchoate interests.** Ind. Rev. Stat. 1894, § 2669, (Rev. Stat. 1901, § 2669), vesting in a married woman her inchoate interest in her husband's real estate, as in case of his death, upon a judicial sale thereof, where such interest is not directed by the judgment to be sold or barred by virtue of such sale, does not apply to land which a husband had conveyed prior to the sale and which was sold as the property of his grantee; nor does it apply to a sale under a foreclosure of a tax lien which attached before the passage of the statute. *Pattison v. Wert*, 153 Ind. 453 (55 N. E. Rep. 227). In a suit to foreclose a mortgage

on the lands of the husband, executed by husband and wife, to which suit general judgment creditors of the husband are made defendants, and to which the wife is a party, it is not necessary that she should set up her inchoate right to the one-third of the lands mortgaged, or the proceeds of their sale, as against the judgment creditors; and, when her interest in the land is not specifically put in issue, she will not be concluded by a judgment directing a sale of the land, and the application of the proceeds, after the payment of the mortgage debt, to the discharge of the general judgments against her husband. *Clements v. Davis*, 155 Ind. 624 (57 N. E. Rep. 905).

**Sec. 372. Effect of divorce on real property rights—**  
**Power of court.** A judgment of divorce obtained by a husband from his wife in a foreign court upon constructive service merely, is not conclusive against the wife so as to bar a homestead or other property right or estate acquired by her before the date of the decree, in the state in which they formerly lived as husband and wife. *Lynn v. Sentel*, 183 Ill. 382 (55 N. E. Rep. 838; 75 Am. St. Rep. 110). Under Ky. Civ. Code Prac., § 425, providing that a decree of divorce shall order the restoration of any property which either party may have obtained "directly or indirectly" from or through the other, during marriage, "in consideration or by reason thereof," it is held that property purchased by the husband and conveyed to his wife without her paying any consideration therefor must be restored to him upon their divorcement; and this is true although the property was purchased with the proceeds of a lottery ticket. *Irwin v. Irwin*, Ky. (52 S. W. Rep. 927; 21 Ky. Law Rep. 622). Under Shannon's Tenn. Code, § 3810, when a wife obtains a divorce on account of the fault or misconduct of her husband "the title to the homestead shall be vested, by the decree of the court granting the divorce, in the wife, and after her death it shall pass to the children." *Belcher v. Belcher*, Tenn. (57 S. W. Rep. 382). Cal. Civ. Code, § 146 construed and applied—power of court as to division or allotment of homestead upon divorce of husband and wife. *Smith v. Smith*, 124 Cal. 651 (57 Pac. Rep. 573); *Huellmantel v. Huellmantel*, 124 Cal. 583 (57 Pac. Rep. 582). Wis. Rev. Stat., § 2364

construed and applied—power of court as to division and distribution of property. *Frackelton v. Frackelton*, 103 Wis. 673 (79 N. W. Rep. 756).

In discussing the power of a court in divorce proceedings, concerning the allowance of alimony and decreeing the release of dower, the supreme court of Ohio, in the case of *Julier v. Julier*, 62 O. St. 90 (56 N. E. Rep. 661), say: "Under a prayer for general relief in an action for divorce, properly instituted, it is within the jurisdiction of the court to settle and adjust by its judgment the rights of the parties with respect to the amount and nature of the alimony that shall be awarded the wife, and the terms and conditions of its payment. And it appears to be well settled that in awarding the alimony the court may, in its discretion, and generally will, confirm and carry into effect by its decree any agreement which the parties have entered into concerning the same that the court deems just and reasonable, and in doing so may adjudge the conveyance of real property by one to the other in pursuance of such agreement. It is laid down as a general rule in *Nels. Div. & Sep.* § 915, that 'the agreement of the parties with respect to permanent alimony is valid, and will generally be approved by the court, and a decree may be entered in conformity to it.' In the absence of a saving provision by statute, as has already been noticed, all right of dower in the husband's lands ceased on the dissolution of the marriage relation by divorce; and when, on an absolute divorce, a provision was made for the wife, either in a general decree or for alimony, or in a decree entered in conformity with the agreement of the parties, such provision was presumed to be in lieu of dower. And, where by statute the right of dower is preserved after divorce, it seems to be an established rule that the court may make an allowance of alimony in lieu of the dower, especially where the parties have so agreed. *Nels. Div. & Sep.* § 909. In *Owen v. Yale*, 75 Mich. 256 (42 N. W. Rep. 817), it was held that a consent decree made after the announcement by the court that a divorce would be granted, providing for such divorce, and for the payment of a gross sum as alimony, 'to be in full of all claims of the complainant against the defendant or his property, which payment has been made according to the terms of the decree, is a bar to any



claim of the wife to dower.' Among other cases which sustain the jurisdiction of the court in divorce cases to render such decrees, and their binding force on the parties, are *Reed v. Reed*, 86 Mich. 600 (49 N. W. Rep. 587); *Tatro v. Tatro*, 18 Neb. 395 (25 N. W. Rep. 571; 53 Am. Rep. 821); *Calame v. Calame*, 24 N. J. Eq. 440; *Webster v. Webster*, 64 Wis. 439 (25 N. W. Rep. 434); *Twing v. O'Meara*, 59 Ia. 326 (13 N. W. Rep. 321). On this subject it is sensibly said by Ashburn, J., in *Petersine v. Thomas*, 28 O. St. 596, 599, that: 'Under our statute a divorce contemplates a final separation of the parties. Their paths in life henceforth diverge, and in legal contemplation they are to each other as strangers. When not otherwise provided, we think the statute contemplates that at the time of decreeing the divorce the court will adjust all the pecuniary rights of the parties in relation to each other springing out of the marital relation about to be forever annulled. To this end the court is given full discretionary authority to make such order concerning the division of the property and support of the children as to the court shall appear, under all the facts and circumstances, just, equitable and reasonable. 1 Swan & C. O. St., p. 509.'

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## IMPROVEMENTS

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### EPITOME OF CASES.

**Sec. 373. Occupying claimants.** Ark Laws 1883, p. 106, §§ 1-4, providing that an allowance shall be made for the value of improvements made by one while in peaceable possession of land under color of title, which on judicial investigation shall be found to belong to another, is held not to apply to a case where the occupant was not disturbed in his possession, or until some proceeding was instituted to oust him; and possession under a bond for title does not constitute color of title within the meaning of the statute. *White v. Stokes*, 67 Ark. 184 (53 S. W. Rep.

1060). An allowance for improvements cannot be made to an occupant under color of title in an action to quiet title, under Ind. Rev. Stat. 1894, §§ 1087, 1088 (Rev. Stat. 1901, §§ 1087, 1088), unless by proper pleading in the action he has made claim for such improvements. *Doren v. Lupton*, 154 Ind. 396 (56 N. E. Rep. 849). Neb. Comp. Stat., ch. 63 construed and applied—who may claim benefit of occupying claimant statute—procedure. *La Bonty v. Lundgren*, 58 Neb. 648 (79 N. W. Rep. 551). Under Bal. Wash. Codes and Stat., § 551, a defendant from whom the property has been recovered can only set off the value of improvements made by him against damages for the detention of the property. *Sengfelder v. Hill*, 21 Wash. 371 (58 Pac. Rep. 250).

**Sec. 374. Improvements by grantees.** A purchaser of the lands of a decedent pending the settlement of his estate, under an authorized contract with his administrator and heirs, cannot set up a claim for improvements made on the lands as a prior lien against creditors of the decedent entitled to a sale of it to pay their claims. *Moore v. Moore*, 155 Ind. 261 (57 N. E. Rep. 242). Upon the setting aside of a sale under a deed of trust it is improper to make an allowance to the purchaser for improvements not shown clearly to have been of a permanent character. *Cullop v. Leonard*, 97 Va. 256 (33 S. E. Rep. 611). A purchaser of property at a judicial sale who places valuable improvements thereon, after he has been induced to believe by the representations of those entitled to redeem that they would not redeem the property, is entitled to a lien therefor against the land upon its subsequent redemption by a third person for those entitled to redeem, which lien is second only to the lien of the person making the redemption for the amount paid by him to redeem. *Gamble v. Branch*, Tenn. (52 S. W. Rep. 897). N. C. Code, p. 182, ch. 10, providing for an allowance for improvements, is for the protection of the purchaser of land who makes lasting improvements under the belief that he has a good title, and has no application to tenants in common. *Holt v. Couch*, 125 N. C. 456 (34 S. E. Rep. 703; 74 Am. St. Rep. 648).

**Sec. 375. Improvements by cotenants.** A tenant in common in possession of the common estate cannot claim an allowance for improvements made thereon, where he has refused to pay the fair rental value of the premises and the profits thus arising to him exceed the expenditure made by him for the improvements. *Bergman v. Kamm-lade*, 109 Ia. 305 (80 N. W. Rep. 418). Where a tenant in common, in possession of property of small value, in the exercise of his honest judgment, conceives the purpose of making a change in the building suited to local conditions, and makes such change, and the other tenants give no attention to the property for a number of years, and tacitly allow him to manage it as he deems best, he will, on demand by them for full rents, and petition to sell the property for partition, be allowed for cost of improvements, taxes, and insurance paid by him, though they exceed the rents, he bearing his share of the excess. *Holt v. Couch*, 125 N. C. 456 (34 S. E. Rep. 703; 74 Am. St. Rep. 648). For particular cases determining the rights of tenants in common as to improvements, upon partition, see *Cocke v. Clausen*, 67 Ark. 455 (55 S. W. Rep. 846); *Bowman v. Pettit*, Ark. (56 S. W. Rep. 780).

**Sec. 376. Improvement by railroad company having power of eminent domain.** The value of improvements placed by a railroad company, having the power of eminent domain, upon land appropriated by it for railroad purposes before commencing proceedings to condemn it, should not be awarded to the landowner in the subsequent condemnation proceedings. *Seattle & M. R. Co. v. Corbett*, 22 Wash. 189 (60 Pac. Rep. 127). The same rule applies where a railroad company enters upon and makes improvements on mortgaged lands under a deed from the mortgagor, which, in a subsequent suit to foreclose the mortgage, is held ineffectual as against the mortgagee on account of all the land being insufficient to satisfy the mortgagee's claim. *St. Louis, K. & S. W. R. Co. v. Nyce*, 61 Kan. 394 (59 Pac. Rep. 1040; 48 L. R. A. 241). This case exhaustively reviews the authorities on the subject and overrules *Briggs v. Railroad Co.*, 56 Kan. 526 (43 Pac. Rep. 1131; epitomized in *Ballard's Law of Real Property*,

Vol. VI, § 247). See, on this subject, Ballards' Law of Real Property, Vol. VI, § 414.

**Sec. 377. Miscellaneous notes.** A husband cannot claim compensation for improvements made on his wife's land during coverture. *Curd v. Brown*, 148 Mo. 82 (49 S. W. Rep. 990); *Woodward v. Woodward*, 148 Mo. 241 (49 S. W. Rep. 1001). A wife who expended her separate means in the improvement of land belonging to her husband's father on his advice and on faith that he would allow her an interest therein in his will, will be protected to the extent such improvements enhance the value of the land. *Dunn v Dunn*, Tenn. (51 S.W.Rep. 119). Neither a defendant, against whom a judgment of ejectment has been rendered, nor his sureties on an appeal bond can recover for improvements made by him pending appeal. *In re Gleeson's Estate*, 192 Pa. St. 279 (43 Atl. Rep. 1032; 73 Am. St. Rep. 808). A fence enclosing public land, upon which one has entered in good faith under what he believes to be a valid entry, may be removed by him upon his entry being defeated. *Bingham Co. Agricul. Ass'n v. Rogers*, Ida. (59 Pac. Rep. 931).

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## INFANTS AND INSANE PERSONS

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### EPITOME OF CASES.

**Sec. 378. Validity of contracts and deeds.** An infant grantor is not estopped from avoiding his deed by a recital therein that he is more than twenty-one years of age. *Wilson's Guardian v. Wilson* Ky. (50 S. W. Rep. 260; 20 Ky. Law Rep. 1971). An executed contract or deed of an insane person who is not under guardianship at the time is voidable only, and not void. *Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370 (56 N. E. Rep. 97; 77 Am. St. Rep. 481); *McKenzie v. McDonnell*, 151 Mo. 431 (52 S. W. Rep. 214); *McKenzie v. McDonnell*, 151 Mo. 461 (52

S. W. Rep. 222) ; *Jamison v. Culligan*, 151 Mo. 410 (52 S. W. Rep. 224). In Illinois it is held that a minor cannot make such an assignment of dower as will be binding on him on arriving at age, nor has the guardian of the minor any power to assign dower. *Sill v. Sill*, 185 Ill. 594 (57 N. E. Rep. 812).

**Sec. 379. Affirmance and disaffirmance of contracts and conveyances.** Upon becoming of age an infant may ratify a void condemnation of his land by a railroad company by receiving the consideration therefor, where there is no unfairness and the company is in possession. *Hobbs v. Nashville, C. & St. L. Ry. Co.*, 122 Ala. 602 (26 So. Rep. 139). Particular evidence held insufficient to show a ratification of a deed made while the grantor was insane. *Beasley v. Beasley*, 180 Ill. 163 (54 N. E. Rep. 187). The deed of a minor is voidable at his option under certain equitable restrictions when he becomes of age, even though he may have represented himself to be of age when the deed was made, and thereby misled the other party to his disadvantage. *Ridgeway v. Herbert*, 150 Mo. 606 (51 S. W. Rep. 1040; 73 Am. St. Rep. 464). A voidable release of a mortgage executed by an insane person not under guardianship extinguishes all his rights under the mortgage until it is disaffirmed by him. *Aetna Life Ins. Co. v. Sellers*, 154 Ind. 370 (56 N. E. Rep. 97; 77 Am. St. Rep. 481). One may have a rescission of a contract for the exchange of lands made by him at a time when he was of unsound mind and incapable of appreciating or guarding his own interests, where it appears that the consideration he received for his land was grossly inadequate. *Hale v. Kobbert*, 109 Ia. 128 (80 N. W. Rep. 308).

**Sec. 380. Return of consideration upon disaffirmance of deed.** Equity will not permit one under legal disability to receive and retain that which forms the consideration for an invalid sale or disposition of his property, and at the same time to retake the property, to the prejudice of those who in good faith have acted upon the transaction as valid. *Hobbs v. Nashville, C. & St. L. Ry. Co.*, 122 Ala. 602 (26 So. Rep. 139). One may recover lands conveyed by him during his minority without restoring the consider-

ation he received for the conveyance, where it is not in his possession or control on his arriving at majority, but has been wasted and dissipated by him while still a minor. *Ridgeway v. Herbert*, 150 Mo. 606 (51 S. W. Rep. 1040; 73 Am. St. Rep. 464); *Bullock v. Sprowls*, 93 Tex. 188 (54 S. W. Rep. 661; 77 Am. St. Rep. 847; 47 L. R. A. 326). In the last case the court reviews its previous decisions on this subject, and concludes by saying: "Where the consideration has been wasted by the minor during his minority, he is not required to pay its equivalent as a condition of recovering property conveyed by him. *Badger v. Phinney*, 15 Mass. 363 (8 Am. Dec. 105); *Chandler Simmons*, 97 Mass. 508 (93 Am. Dec. 117); *Holden v. Pike*, 14 Vt. 405 (39 Am. Dec. 228); *Whitcomb v. Joslyn*, 51 Vt. 79 (31 Am. Rep. 678; *Roof v. Stafford*, 7 Cow. 182; *Hillyer v. Bennett*, 3 Edw. Ch. 222; *Green v. Green*, 69 N. Y. 553 (25 Am. Rep. 233); *Hill v. Anderson*, 5 Smeedes & M. 216; *Harvey v. Briggs*, 68 Miss. 60 (8 So. Rep. 274; 10 L. R. A. 62); *Brantley v. Wolf*, 60 Miss. 420; *Craig v. Van Bebber*, 100 Mo. 584 (13 S. W. Rep. 906; 18 Am. St. Rep. 569). The great weight of authority, and, we think, the clear reason, are in favor of this proposition. *MacGreal v. Taylor*, 167 U. S. 688 (17 Sup. Ct. Rep. 961; 42 L. Ed. 326), where many of the authorities are cited." Where lands have been conveyed to a minor by order of a void or erroneous judgment, upon arriving at majority he may cause such judgment to be reversed without first offering to reconvey the land; but he must tender reconveyance before recovering the property in lieu of which the lands were conveyed to him. *Roberts v. Roberts*, 61 O. St. 96 (55 N. E. Rep. 411).

The deed of an insane person not under guardianship is not absolutely void, but only voidable, and can be cancelled only on a return or tender of the consideration received. *McKenzie v. Donnell*, 151 Mo. 431 (52 S. W. Rep. 214); *McKenzie v. Donnell*, 151 Mo. 461 (52 S. W. Rep. 222); *Jamison v. Culligan*, 151 Mo. 410 (52 S. W. Rep. 224). In the second case cited it is held that the obligation to make restoration extends only to the consideration paid by the original grantee, and does not require the grantor to return to an innocent third person the amount of a loan made by him to the grantee on the faith of his apparent

title. The court say: "Without reviewing the multitude of cases which the industry and research of the able counsel have collected in this case, we conclude that the right to avoid, upon equitable terms, a deed made by an insane person, cannot be defeated by a conveyance of the land to an innocent third person for value and without notice, nor can additional terms to the right to redeem be added by the grantee incumbering the property. To deny the right to avoid the deed because the property had passed into the hands of an innocent purchaser for value and without notice would, in effect, deny the right to avoid at all, and would nullify the beneficent protection which courts of equity throw around those who are so afflicted that they cannot protect themselves. It would be an easy matter for a grantee of an insane man to sell the property, pocket the proceeds, and look with indifference upon subsequent litigation, if by so doing he could convey a perfect title to a third person. It would be a queer law that, pretending to be a shield to the helpless, should thus put a sword in the hands of a person *sui juris* to help him wrest property from a person *non compos mentis* by such simple means. Adequate justice and complete equity are done when the insane man is required to restore the benefits he has received from the transaction, and there is neither right, law nor morality which would require him to restore benefits which some one else has received from the land, but not from the insane man's contract. The fact that Mason loaned the money upon the faith of the land, and that the proper records showed the title to be in the Donnells, and gave no notice of McKenzie's condition when he wrote the Stewart deed of trust under which Donnell acquired title,—in short, the fact that Mason was an innocent party, and parted with his money without notice as to McKenzie's condition,—is wholly immaterial. The doctrine that, where one or two innocent persons must suffer, the loss must fall on him who made the condition possible, has no application to cases of this character, for an insane person cannot be held responsible for consequences which he could not understand or prevent. Where an insane person is entitled to avoid a conveyance as between himself and his immediate grantee, he is also entitled to avoid it as between himself and any grantee or mortgagee holding under his

grantee; and the terms to be imposed are the benefits that flowed from the grantee to the insane man, and not such benefits as the insane man's grantee received from any other person to whom he granted or mortgaged the land. *Rogers v. Blackwell*, 49 Mich. 192 (13 N. W. Rep. 512); *Hull v. Louth*, 109 Ind. 315 (10 N. E. Rep. 270; 58 Am. Rep. 405); *Hovey v. Hobson*, 53 Me. 451 (89 Am. Dec. 705); *Chew v. Bank*, 14 Md. 318; *Society v. De Lashmutt*, 67 Fed. Rep. 399; *Dewey v. Allgire*, 37 Neb. 6 (55 N. W. Rep. 276; 40 Am. St. Rep. 468). As was said in *Hovey v. Hobson*, 53 Me. 451 (89 Am. Dec. 705), the bona fide grantee of the grantee of an insane person must rely on the covenants of his deed for restitution, and it is not necessary that he should be placed in statu quo by a plaintiff in a suit to vacate the conveyance."

**Sec. 381. Judicial sale of lands of infants and insane persons.** A decree ordering the sale of an infant's land which shows on its face the filing in a court of general jurisdiction of a proper petition, the giving of notice and an answer by the defendants, will not be set aside on a collateral attack after a lapse of several years, although the original petition has been destroyed and the decree fails to show findings which were necessary to the ordering of the sale. *Field v. Peeples*, 180 Ill. 376 (54 N. E. Rep. 304). A sale of a minor's real estate made by a probate court of the county in which he resides, by proceedings regular on their face, cannot be attacked collaterally for want of jurisdiction of the court, on the ground that the minor's estate was under the jurisdiction of the court of another county, on account of a guardianship previously appointed for him in such county where he formerly resided. *Cox v. Boyce*, 152 Mo. 576 (54 S. W. Rep. 467; 75 Am. St. Rep. 483). Where an action against an infant for the sale of his land is brought by his grandfather who was his statutory guardian, and who has charge of the infant as a member of his family, it is sufficient service of process to deliver a copy to the infant in the presence of his statutory guardian and grandfather. *Hendrickson v. Canter*, Ky. (49 S. W. Rep. 188; 20 Ky. Law Rep. 1258). Md. Code, art. 16, § 47 construed and applied—sale of lands of habitual drunkard by committee—



power of court—procedure. *Tome v. Stump*, 89 Md. 264 (42 Atl. Rep. 902). For an exhaustive discussion of the statute and case law of Georgia, as to the jurisdiction of courts of equity over lands held in trust for minors, see *Richards v. East Tennessee, V. & G. Ry. Co.*, 106 Ga. 614 (33 S. E. Rep. 193; 45 L. R. A. 712).

**Sec. 382. Guardians—Powers—Appointment of guardian ad litem—Service of summons on infants.** A guardian, who, with knowledge of his ward's interest in certain lands, consents for a person who has no title thereto to enter upon and use such lands, and in consequence of such negligent conduct on the part of the guardian the ward loses the realty itself, as well as the rents, issues, and profits therefrom, becomes liable, not only for the rents, but for the value of the land. *Short v. Mathis*, 107 Ga. 807 (33 S. E. Rep. 694). A guardian for an infant may appeal from a judgment in an action for partition and assignment of dower, notwithstanding the appointment of a guardian ad litem for such infant during the pendency of the proceedings. 2 Starr & C. Ann. Ill, Stat., p. 1470, § 21 construed and applied. *Sill v. Sill*, 185 Ill. 594 (57 N. E. Rep. 812). A guardian ad litem should be appointed for wards in all proceedings in which their legal guardians have a private interest adverse to them. *Phillips v. Phillips*, 185 Ill. 629 (57 N. E. Rep. 796). Service of summons upon an infant in the mode authorized by the statute must precede the appointment of a guardian ad litem for him, and though such guardian be appointed, and he appears and represents the interests of the minor, the appointment and all subsequent proceedings in the action, including the final judgment, are void as against the infant not served with process or summons; and an infant defendant is incompetent to waive or admit service of the summons upon him, or to confer jurisdiction upon the court by a voluntary appearance. *Phelps v. Heaton*, 79 Minn. 476 (82 N. W. Rep. 990). To the same effect is the case of *Westmeyer v. Gallenkamp*, 154 Mo. 28 (55 S. W. Rep. 231; 77 Am. St. Rep. 747). As to what constitutes sufficient service of summons on infants, see *Harris v. Sargeant*, 37 Or. 41 (60 Pac. Rep. 608); *Hendrickson v. Canter*, Ky. (49 S. W. Rep. 188; 20 Ky. Law Rep. 1258).

**Sec. 383. Allowance to guardian ad litem for services—Power of court to make and declare a lien on property.** A guardian ad litem, appointed to defend infant defendants' title to property, is entitled to have the court appointing him, and in which the litigation occurs, determine the proper allowance that should be made to him for services actually performed and disbursements reasonably made, and to a reasonable exercise of the power of the court to enable him to recover such allowance out of any property under the control of the court or protected in the action. Ordinarily the control of an infant's property, forming the subject of an action in court, for the purpose of enforcing payment of the allowance made to his guardian ad litem for services and disbursements therein, should not go further than the income thereof; but where there is no income, or not sufficient to secure payment of such allowance within a reasonable time, sufficient of the property should be sold for that purpose. A guardian ad litem having performed valuable services for infant defendants in protecting their title to property, from which there is no income, there being no other way by which the court can enforce payment of his compensation for services and disbursements, it is a proper exercise of judicial power to declare the same a lien upon such property and to order that in case the same be not paid within one year from the entry of the order, that the lien may be enforced according to the rules and practice of the court and the statutes in regard to foreclosure of mortgages. *Tyson v. Richardson*, 103 Wis. 397 (79 N. W. Rep. 439).

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## INSURANCE

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### EPITOME OF CASES.

**Sec. 384. Title insurance.** To sustain an action on a policy of insurance of the title of land, based on an eviction of the insured from the land, the plaintiff must show either an eviction under a paramount title by due process of law or a

disturbance of title or possession under a paramount title equivalent to an eviction. *Barton v. West Jersey Title & Guaranty Co.*, 64 N. J. L. 24 (44 Atl. Rep. 871). A count disclosing that plaintiff agreed to loan money to an applicant upon condition that he should secure the loan by a mortgage on real estate certified to be a first lien thereon by a title company having corporate capacity to do so; that the borrower applied to the company, and made known to it his agreement with plaintiff; that he requested the company to make the required search and certificate; that it agreed to do so, and to deliver the same to him, to be delivered to plaintiff, to be used for the purpose of procuring said loan; and that the company did make the certificate, and deliver it to the borrower, who paid for it, and by its use obtained his loan,—shows a contract on the part of the company including an undertaking to use care in certifying truly as to previous incumbrances, upon which, in case the company carelessly and untruthfully certifies that the mortgage is a first lien, when in fact there is a previous recorded mortgage on the lands, the plaintiff has a good cause of action if injured thereby. *Economy Bldg. & L. Ass'n v. West Jersey Title & Guar. Co.*, 64 N. J. L. 27 (44 Atl. Rep. 854).

**Sec. 385. Insurable interest.** One having an estate by entirety in land has an insurable interest in the whole premises. *Clawson v. Citizens' Mut. Fire Ins. Co.*, 121 Mich. 591 (80 N. W. Rep. 573; 80 Am. St. Rep. 538). Members of an unincorporated company to which a deed of property has been delivered have an insurable interest therein. *Grabbs v. Farmers' Mut. Fire Ins. Ass'n*, 125 N. C. 389 (34 S. E. Rep. 503). From the time of a valid contract of sale of real estate, a deed to be executed at a future period, the purchaser has an insurable interest in the property. *Dunn v. Yakish*, 10 Okla. 388 (61 Pac. Rep. 926). For note on "Insurable interest in unfinished building during its construction by a contractor," see 43 L. R. A. 664.

**Sec. 386. Insurance by life tenant.** Money collected by a life tenant on a total loss by fire, under a policy of insurance which the life tenant took out in her own name, paying the premiums therefor with her own money, should be used in rebuilding, or should go to the remainderman, re-

serving the interest for life for the life tenant. *Green v. Green*, 56 S. C. 193 (34 S. E. Rep. 249; 46 L. R. A. 525). Upon this subject the supreme court of Rhode Island say: "If a policy is issued to a life tenant for the full value of the fee, and this amount is recovered by him, he certainly ought to be held to be a trustee for the remainderman as to the excess of the amount received over the value of his life interest. *Welsh v. Corporation*, 151 Pa. St. 607 (25 Atl. Rep. 142; 31 Am. St. Rep. 786). See, also, *Brough v. Higgins*, 2 Grat. 409; and *Graham v. Roberts*, 43 N. C. 99." *Sampson v. Grogan*, 21 R. I. 174 (42 Atl. Rep. 712; 44 L. R. A. 711).

**Sec. 387. Rights of mortgagee as to insurance.** Parties to a mortgage by agreement therein may authorize the mortgagee to take out insurance on the property where the mortgagor fails to do so, and include his expenses on account thereof with the debt secured, *Baker v. Aalberg*, 183 Ill. 258 (55 N. E. Rep. 672); *Baker v. Jacobson*, 183 Ill. 171 (55 N. E. Rep. 724); but premiums paid by a mortgagee for insurance on the mortgaged property cannot be recovered by him upon foreclosure, in the absence of a stipulation in the mortgage giving him this right, *Culver v. Brinkerhoff*, 180 Ill. 548 (54 N. E. Rep. 585); *Miller v. Hunt*, Ida. (57 Pac. Rep. 315). Insurance upon the mortgaged premises taken out by the mortgagor in his own name, who has agreed to insure the same for the benefit of the mortgagee, will be presumed to have been taken for the mortgagee's benefit, and the latter may enforce an equitable lien on the proceeds arising therefrom; but he cannot enforce such lien against a good faith assignee of the policy to whom it was transferred after loss, for value, and to whom the insurer had paid the proceeds of the policy. *Swearengen v. Hartford Fire Ins. Co.*, 56 S. C. 355 (34 S. E. Rep. 449). A mortgagee, who, upon foreclosure of his mortgage, has purchased the mortgaged premises for the amount of his debt, cannot recover on an insurance policy procured by the mortgagor as further security for him and made payable to him, where the loss occurred after his purchase of the premises and during the period of redemption. *Reynolds v. London & Lancashire Fire Ins. Co.*, 128 Cal. 16 (60 Pac. Rep. 467; 79 Am. St. Rep. 17).

**Sec. 388. Mortgage clause in policy—Force and effect of conditions in policy.** A mortgagee to whom an insurance policy issued to his mortgager is made payable "as his interest may appear" takes subject to any defense which can be made against the mortgagor on account of his contracting additional insurance in violation of the terms of the policy. *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549 (54 N. E. Rep. 772). Where a policy containing an ordinary clause providing for the payment of any loss to a mortgagee as his interest may appear, also contains a stipulation that if an interest should exist in favor of a mortgagee "the conditions hereinbefore contained shall apply in the manner expressed in such provision and condition of insurance relating to such interest as shall be written upon, attached, or appended thereto," it is held that the mortgagee's right to recover is not affected by the insured's breach of a condition against change of title, where no condition to that effect was set out or attached to the policy. *East v. New Orleans Ins. Ass'n*, 76 Miss. 697 (26 So. Rep. 691). Citing, *Oakland Home Ins. Co. v. Bank of Commerce*, 47 Neb. 717 (66 N. W. Rep. 646; 58 Am. St. Rep. 663; 36 L. R. A. 673). A grantee of mortgaged premises who has assumed and agreed to pay the mortgage debt is bound by stipulations in an insurance policy on the mortgaged premises of which he has taken an assignment to the effect that the right of the mortgagee under such policy should not be invalidated by the acts of the mortgagor and that upon the insurer becoming liable to the mortgagee for a loss for which no liability existed as to the mortgagor, it might pay the mortgage debt and take an assignment thereof. Such a payment by the insurer does not discharge the debt and extinguish the mortgage, but it may be enforced against the premises by the insurer or his assignee. *Badger v. Platts*, 68 N. H. 222 (44 Atl. Rep. 296; 73 Am. St. Rep. 572). Upon the subject of this section, the supreme court of Arkansas, in the case of *Planters' Mut. Ins. Ass'n v. Southern Sav. Fund & L. Co.*, 68 Ark. 8 (56 S. W. Rep. 443), say: "Whenever the owner sells property against the loss or damage of which he has been insured, and assigns his policy to the purchaser, 'and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee to indemnify him in the manner and upon the con-

ditions his vendor was insured; and the exemption of the insurer from further liability to the vendor, and the premium paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee.' *Wilson v. Hill*, 3 Metc. (Mass.) 66. In that case he will not be affected by the subsequent acts or neglect of his assignor. If the transfer be made by a mortgagor to a mortgagee of the insured premises as a collateral security, without any new consideration moving from the assignee to the insurer, the assignee can only recover where his assignor could have done so had no assignment been made. 'Such an assignment does not convert the policy into a contract of indemnity to the mortgagee. It is the interest of the mortgagor alone that is covered by it. The assignee takes it subject to all the express stipulations contained in the policy, and he cannot recover in case of a subsequent breach' by the mortgagor of the conditions which render the policy void. *Insurance Co. v. Roberts*, 31 Pa. St. 438; *Buffalo Steam-Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y. 401; *Insurance Co. v. Fix*, 53 Ill. 151 (5 Am. Rep. 38); *Edes v. Insurance Co.*, 3 Allen, 362; *Swenson v. Sun Fire Office*, 68 Tex. 461 (5 S. W. Rep. 60); 1 Bid. Ins. §§ 321, 322, and cases cited. But where the assignment is based upon a contract between the insurer and the assignee, which is supported by a new and distinct consideration, such contract will govern. *Foster v. Insurance Co.*, 2 Gray, 216; *Hastings v. Insurance Co.*, 73 N. Y. 141; *Davis v. Insurance Co.*, 135 Mass. 251."

**Sec. 389. Action by mortgagee on insurance policy.**

A mortgagee whose debt exceeds the value of the property and to whom a policy of insurance issued to the mortgagor is made payable "as his interest may appear" may sue alone on such policy without joining the insured as plaintiff where he is made a defendant. *Franklin Ins. Co. v. Wolff*, 23 Ind. App. 549 (54 N. E. Rep. 772). The court say: "In the case at bar the insurer had contracted with the insured, and, upon certain contingencies, agreed to pay the loss to a third person. We see no reason for denying him the right to maintain an action on such promise in his own name, when he shows he is entitled to recover the full amount of insurance. His debt exceeds the amount of insurance. Nothing is due the

insured. The insured is a necessary party, but, under the facts pleaded, it is not material whether he is joined as plaintiff or made a defendant. He is made a party to answer as to his interest, and whatever rights he may have will be barred by the event of the suit. See *Hammell v. Insurance Co.*, 50 Wis. 240 (6 N. W. Rep. 805); *Maxcy v. Insurance Co.*, 54 Minn. 272 (55 N. W. Rep. 1130); *Bartlett v. Insurance Co.*, 77 Ia. 86 (41 N. W. Rep. 579); *Tilley v. Insurance Co.*, 86 Va. 811 (11 S. E. Rep. 120); *Motley v. Insurance Co.*, 29 Me. 337 (1 Am. Rep. 591); *May, Ins.*, § 449; *Ostr. Ins.* (2d Ed.) p. 355; *Beach, Ins.*, § 1285; *Joyce, Ins.*, § 3612; 1 *Jones, Mortg.*, § 408." A mortgagee cannot sue on a policy of insurance on the mortgaged premises made payable to the mortgagor and him "as their interests may appear," without making the mortgagor a party, although he has left the state and concealed his whereabouts. *Procter v. Georgia Home Ins. Co.*, 124 N. C. 265 (32 S. E. Rep. 716).

**Sec. 390. Condition avoiding policy for fraud or concealment by insured—Failure to disclose matters concerning which no inquiry is made.** Where a policy covering both real and personal property issued for one entire premium, contains a stipulation that "this entire policy shall be void if the insured has concealed, misrepresented in writing or otherwise any material fact or circumstance concerning the insurance or the subject thereof, whether before or after the loss," no recovery can be had thereon for loss of the house where the insured was guilty of fraud in his proof of loss as to the furniture. *Home Ins. Co. v. Connally*, 104 Tenn. 93 (56 S. W. Rep. 828). A condition in an insurance policy avoiding it "if the insured has concealed or misrepresented, in writing or otherwise, any material fact or condition concerning the insurance or the subject thereof," is not violated by the failure of the insured to whom a policy was issued on his oral application, to disclose the fact that the property was incumbered, where no such inquiry was made of him by the insurer and he had no knowledge that the existence of the incumbrance would affect the insurance. *Arthur v. Palatine Ins. Co.*, 35 Or. 27 (57 Pac. Rep. 62; 76 Am. St. Rep. 450). The court say: "Where inquiry is made, it is the duty of the assured to disclose the facts relating to the construction, location, situation, condition and uses of the risk, as well as to its char-

acter and value, whether he knows them to be material or not. And it is not a question as to what he supposes or believes in reference to the subject-matter of the inquiry, but simply whether, in fact, the matter inquired about is material to the risk, and, if so, any failure on his part to answer the inquiry fully will be fatal to his policy, even though it was not fraudulent or designed. But the mere failure or neglect to make known, without inquiry, facts which the insurer may regard as material to the risk, is not a breach of the provision of the policy above quoted, because the assured has the right to assume that the insurer will make proper inquiry in reference to such matters as it may deem material to the risk, and that it waives knowledge as to all other matters, except, possibly, in reference to unusual or extraordinary circumstances within the knowledge of the assured, but of which there is nothing to put the insurer upon inquiry. *Koshland v. Insurance Co.*, 31 Or. 402 (49 Pac. Rep. 866); *1 May, Ins.*, § 207; *1 Wood, Ins.* 517; *Richards, Ins.*, § 136; *Sanford v. Insurance Co.*, 11 Wash. 653 (40 Pac. Rep. 609); *Morrison's Adm'r v. Insurance Co.*, 18 Mo. 262 (59 Am. Dec. 299); *Guest v. Insurance Co.*, 66 Mich. 98 (33 N. W. Rep. 31); *Alkan v. Insurance Co.*, 53 Wis. 137 (10 N. W. Rep. 91); *Short v. Insurance Co.*, 90 N. Y. 16 (43 Am. Rep. 138); *Insurance Co. v. Munns*, 120 Ind. 30 (22 N. E. Rep. 78; 5 L. R. A. 430)."

**Sec. 391. Condition avoiding policy for lack of sole and unconditional ownership by insured.** A sole and unconditional ownership clause in an insurance policy is violated where the persons to whom it is issued own only an undivided half interest in the property, although they believe themselves to be the sole owners on account of an executory contract for the purchase of the other half. *Liverpool & L. & G. Ins. Co. v. Cochran*, 77 Miss. 348 (26 So. Rep. 932; 78 Am. St. Rep. 324). An insurance policy containing a condition avoiding it in case the interest of the insured is any other or less than a perfect legal or equitable ownership, is void, where, at the time of its issuance, the property had been sold to the wife of the insured under a mortgage foreclosure and the period of redemption had expired. *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584 (56 S. W. Rep. 44; 77 Am. St. Rep. 136). An insurance policy providing that it shall be void if the interest of the insured be other than unconditional and



sole ownership, given to one whose only interest in the insured property is that he has given a bond for a debt secured by a mortgage on the premises and is the holder of a subsequent mortgage made by the owner, does not render the insurer liable for the destruction of the property either to the insured or the owner. *Ordway v. Chace*, 57 N. J. Eq. 478 (42 Atl. Rep. 149).

**Sec. 392. Condition in policy against change in insured's title—Liens and incumbrances.** A condition avoiding an insurance policy on property "if the said property be sold" without the consent of the insurer, refers only to an absolute transfer of the insured's entire interest, and a sale by him of the premises does not avoid the policy as to buildings in which he reserves a life estate. *Clinton v. Norfolk Mut. Fire Ins. Co.*, 176 Mass. 486 (57 N. E. Rep. 998; 50 L. R. A. 833; 79 Am. St. Rep. 325). The execution of a deed to insured property by the owner thereof to another at the solicitation of a third person who receives and records it but without authority from the grantee, does not constitute such a change of ownership as will defeat recovery of the insurance upon subsequent destruction of the premises, the grantee thereupon refusing to accept the deed and the third party reconveying to the grantor. *Whitney v. American Ins. Co.*, 127 Cal. 464 (59 Pac. Rep. 897). The mere rendition of a judgment of unlawful detainer against a lessee, execution on which cannot be issued for a period of five days from the entry thereof, under 2 Bal. Ann. Wash. Codes & Stat., § 5542, does not effect such a change in the lessee's interest or possession as will forfeit an insurance policy issued to him on a building belonging to him, and which is destroyed within the five days, so as to release the insurer. *Browne Nat. Bank v. Southern Ins. Co.*, 22 Wash. 379 (60 Pac. Rep. 1123). A policy of insurance containing a stipulation that it "shall be void if any change other than by the death of the insured take place in the interest, title or possession of the subject of the insurance," is defeated by sale and conveyance of the property by a devisee of the insured, although at the time of the loss he had not parted with the possession of the property and the time fixed in the deed for delivery of possession had not arrived. *Robinson's Ex'r v. North British Mer. Ins. Co.*, Ky. (53 S. W. Rep. 660; 21 Ky. Law Rep. 982).

Judgments against an insured which do not constitute liens on the insured property are not a violation of a condition in the policy that it should be void if the property should become incumbered. *Smith v. Continental Ins. Co.*, 108 Ia. 382 (79 N. W. Rep. 126). An insurance policy containing a condition providing for its forfeiture in case the property shall be "incumbered," is not forfeited by the recovery of a judgment in invitum against the insured during the life of the policy. *Phenix Ins. Co. v. Smith*, 9 Kan. App. 828 (61 Pac. Rep. 501). A policy covering both real and personal property containing a condition that it shall become null and void "if the property shall hereafter become mortgaged or incumbered," is not forfeited by a mortgage or incumbrance on a part of the property. *Born v. Home Ins. Co.*, 110 Ia. 379 (81 N. W. Rep. 676; 80 Am. St. Rep. 300).

**Sec. 393. Condition in policy against change in insured's interest or title—Executory contract of sale.** A condition in a policy avoiding it "if any change takes place in the interest, title or possession of the subject of insurance" is not violated by an offer of the property for sale by the insured upon certain contingencies, in pursuance of which a bid is received but the sale never is consummated. *Jones v. Capital City Ins. Co.*, 122 Ala. 421 (25 So. Rep. 790). The "interest" of an insured in premises is not so changed by an executory contract for their sale under which no deed was passed or possession taken, as to work a forfeiture of the policy in pursuance of a condition in it providing "that if the interest of the assured became other than the entire, unconditional, unincumbered and sole ownership, the policy should be void, unless agreement therefor was indorsed on the policy." *Arkansas Fire Ins. Co. v. Wilson*, 67 Ark. 553 (55 S. W. Rep. 933; 77 Am. St. Rep. 129; 48 L. R. A. 510). The court say: "It is a matter of nice discrimination to determine whether the word 'interest,' as used in the condition, is synonymous with the word 'title,' or whether it means that and something besides. The authorities generally establish the rule that, where the condition is against any change in the legal title, an executory contract of sale is not a violation of the condition; so that if the word 'interest,' as used in this proviso, meant 'title,' there would be no difficulty in reaching the conclusion that the policy was not forfeited. *Smith v.*

Insurance Co., 91 Cal. 323 (27 Pac. Rep. 738; 13 L. R. A. 475; 25 Am. St. Rep. 191); *Kempton v. Insurance Co.*, 62 Ia. 83 (17 N. W. Rep. 194); *Grable v. Insurance Co.*, 32 Neb. 645 (49 N. W. Rep. 713); *Insurance Co. v. Kelly*, 32 Md. 421; *Insurance Co. v. Bethel*, 142 Ill. 537 (32 N. E. Rep. 510); *Masters v. Insurance Co.*, 11 Barb. 624; *Hill v. Protection Co.*, 59 Pa. St. 474; *Browning v. Insurance Co.*, 71 N. Y. 508 (27 Am. Rep. 86). What, then, does the word 'interest,' in the provision, 'if the interest of the assured be or become other than the entire, unconditional, unincumbered and sole ownership of the property,' etc., mean? Is it synonymous with 'title?' In *Gibb v. Insurance Co.*, 59 Minn. 267 (61 N. W. Rep. 137; 50 Am. St. Rep. 405), the provision was, 'This entire policy, unless otherwise provided by agreement indorsed hereon or added thereto, shall be void \* \* \* if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance,' etc. The facts, as they pertained to this provision, were that the assured had made a contract in writing whereby he sold and agreed to convey to the grantee the insured premises, by deed of warranty, on prompt and full performance by her of the agreement, which was that she (grantee) was to pay therefor the sum of \$2,500,—\$300 cash, and \$1,000 in installments of \$50 every 60 days thereafter until paid; the balance to be paid in assuming a certain mortgage. The grantee was to have possession of the premises until default in payment, and in case of default she agreed to surrender possession on demand, and that the agreement should be void at the option of the vendor. She (the grantee) entered into possession of the buildings and premises, and occupied the same until the time of the fire, and made all her payments during that time, and was not in default in any manner upon said contract. Upon these facts the court ruled that there was a forfeiture of the policy. In *Germond v. Insurance Co.*, 2 Hun, 540, a policy of insurance provided that if the property should be sold or conveyed, or the interest of the parties therein changed, it should be null and void. After the issuing of the policy the owner contracted, under seal, to sell the property covered thereby to one S., who paid part of the purchase price. In an action upon the policy it was held that such contract of sale and payment constituted a change of interest in

the property insured, and rendered the policy void. These cases are relied upon by the learned counsel for appellant to support its contention for a forfeiture of the policy, and, indeed, they are more nearly in point than any others we have been able to find. In the Minnesota case there is a very marked difference in the language of the provision from that in the case at bar. That provision is, 'if any change,' etc., 'takes place in the interest, title or possession.' Here the grammatical arrangement and punctuation (a comma being used between the words 'interest' and 'title') would indicate clearly that 'interest' and 'title' were intended to represent different ideas,—were not used synonymously,—while in the provision of the policy under consideration, 'if the interest of the assured be or becomes other than the,' etc., 'sole ownership,' there is nothing to indicate that the word 'interest' was used in any other sense than as synonymously with 'ownership' or 'title.' The New York case, however, on this point, is perfectly analogous, and directly decides, under the facts of that case, that the policy was forfeited. But if we concede, upon the authority of these cases, that the word 'interest' is not used synonymously with 'title,' the question still remains, was there such a change of interest, under the facts of this case, as, in the contemplation of the parties, worked a forfeiture? In the Minnesota case, above, there could be no question about that, for the reason that the grantee had gone into and was in possession at the time the loss occurred, and had fully complied with the terms of the contract, which was definite as to the manner and time of performance. Likewise, in the New York case the contract was under seal, and, we may therefore assume, was definite and certain in its terms. A part of the purchase price had been paid,—how much, is not stated. In both cases the courts might very well have concluded that the contracts to convey conferred rights on the grantee therein, capable of enforcement according to their terms, which materially changed the status of the insurer and the insured towards each other, as to the risks to the premises, which such condition is intended to protect against."

**Sec. 394. Condition in policy against property becoming involved in foreclosure proceedings.** A condition in an insurance policy providing for its forfeiture in case of the commencement of proceedings for foreclosure and sale under

a mortgage, is violated, so as to work a forfeiture of the policy, by an advertisement of the property for sale under a trust deed, although the foreclosure proceedings were stopped without going further by the broken condition of the mortgage being complied with. *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90 (52 S. W. Rep. 238; 74 Am. St. Rep. 521). Citing, *Insurance Co. v. Lewis*, 30 Mich. 41; *Titus v. Insurance Co.*, 81 N. Y. 410; *Insurance Co. v. Brown*, 77 Md. 79 (25 Atl. Rep. 992). Construing a condition in an insurance policy providing that it shall be void "if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy, by virtue of any mortgage or trust deed," it is held that the insured's knowledge of the commencement of foreclosure proceedings and the forfeiture on account thereof will date from the service of summons on him. *Norris v. Hartford Fire Ins. Co.*, 55 S. C. 450 (33 S. E. Rep. 566; 74 Am. St. Rep. 765).

**Sec. 395. Condition in policy against vacancy of premises.** A condition in an insurance policy issued on a manufacturing establishment that the policy should be void if the premises should not be operated for ten consecutive days is valid, and the breach of such a condition renders the policy void immediately. *Cronin v. Fire Ass'n of Philadelphia*, 123 Mich. 277 (82 N. W. Rep. 45). Temporary absence of an occupant while visiting does not invalidate a policy providing that it shall be void if "the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain for more than thirty days." *Johnson v. Norwalk Fire Ins. Co.*, 175 Mass. 529 (56 N. E. Rep. 569). Mere entry upon premises by a prospective tenant and the cleaning of the dwelling house by him and his servants with a view toward his occupying it does not constitute such occupancy as will avoid a condition in an insurance policy on the buildings avoiding it in case they are vacant and unoccupied. *Thomas v. Hartford Fire Ins. Co.*, Ky. (53 S. W. Rep. 297; 21 Ky. Law Rep. 914). A house is unoccupied within the meaning of a condition in a fire insurance policy that the property is "occupied and to be occupied by a tenant as a private dwelling," the policy to become void if the property should become unoccupied without the assent of the company, where,

upon the removal of the tenant, the son of the owner slept in the house during the day and worked nights, having only a cot, a chair and an alarm clock in the house, and the family of the owner resided next door and obtained water from a cistern in the kitchen of the insured house, and the owner went through it very day; but the question as to whether the risk was increased by such occupancy should be left to the jury, with proper instructions. *Eureka Fire & M. Ins. Co. v. Baldwin*, 62 O. St. 368 (57 N. E. Rep. 57). The clause in § 53, ch. 175, Minn. Laws 1895, which provides that, if the insured premises "shall become vacant by the removal of the owner or occupant and so remain vacant for more than thirty days without the assent" of the insurer, the policy shall be void, is not affected, qualified, or modified by the clause in § 25 which provides that in the absence of any change increasing the risk without the consent of the insurer, and in the absence of intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal upon which the insurer receives a premium shall be paid; and in an action upon such a policy it is a sufficient defense to plead a vacancy within the prohibition of § 53 without alleging that the condition of the premises increased the risk. *Doten v. Aetna Ins. Co.*, 77 Minn. 474 (80 N. W. Rep. 630).

**Sec. 396. Waiver of forfeiture clauses in policy.** A condition against vacancy is waived where the agent of the insurer knew at the time of issuing the policy that the premises were unoccupied. *Hilton v. Phoenix Assur. Co. of London*, 92 Me. 272 (42 Atl. Rep. 412). An insurance company which issues a policy on the insured's application in which he answers the question "What is your title?" by writing after the question the word "Deed," thereby waives the conditions of the policy as to title, as such an answer was sufficient to put the company upon inquiry as to the nature of the insured's title. *Clawson v. Citizens' Mut. Fire. Ins. Co.*, 121 Mich. 591 (80 N. W. Rep. 573; 80 Am. St. Rep. 538). Where the agent of an insurance company who is authorized to issue policies of insurance in its name issues such a policy with full knowledge as to the ownership of the property, the company cannot afterward insist upon a forfeiture of the policy on account of the title of the insured not being that of an unconditional and sole ownership as required by the conditions of

the policy; and this is true although the policy stipulated that no agent had power to waive any of its provisions except in writing. *Grabbs v. Farmers' Mut. Fire Ins. Ass'n*, 125 N. C. 389 (34 S. E. Rep. 503). The general agent of an insurance company, having full power to issue policies and receive premiums, may waive a condition in a policy avoiding it in case foreclosure proceedings involving the property are commenced, although the policy contains a provision that none of its conditions can be waived by the agent. *Springfield Steam Laundry Co. v. Traders' Ins. Co.*, 151 Mo. 90 (52 S. W. Rep. 238; 74 Am. St. Rep. 521). Where an insurance company adjusts a small loss under the policy knowing that a condition against incumbrances has been broken, such act constitutes a waiver of the forfeiture, and the company cannot afterwards deny its liability when a second loss occurs. *Westchester Fire Ins. Co. v. McAdoo*, Tenn. (57 S. W. Rep. 409). The fact that a breach against the making of alterations in premises so as to increase the risk is past, and did not contribute to the loss, does not necessarily put an end to the right of the insurer to avoid the policy. *Hill v. Middlesex Mut. Fire Assur. Co.*, 174 Mass. 542 (55 N. E. Rep. 319). For particular fact case illustrating what constitutes a waiver of conditions of forfeiture in an insurance policy, see *Planters' Mut. Ins. Co. v. Loyd*, 67 Ark. 584 (56 S. W. Rep. 44; 77 Am. St. Rep. 136). For a discussion and citation of New York cases concerning what constitutes a waiver of a condition of forfeiture in an insurance policy, see *Gibson Electric Co. v. Liverpool & L. & G. Ins. Co.*, 159 N. Y. 418 (54 N. E. Rep. 23).

**Sec. 397. Liability of insurance company for agent's contracts.** An insurance company's agent who is empowered to countersign, issue and renew policies of insurance may bind the company by an oral contract to renew an existing insurance policy. *Squier v. Hanover Fire Ins. Co.*, 162 N. Y. 552 (57 N. E. Rep. 93; 76 Am. St. Rep. 349). One held out as the general agent of an insurance company to negotiate contracts of insurance, agree upon a rate of premium, the term of insurance, and all the terms of the contract, and for which purpose he was furnished with policies executed in blank by the president and secretary, with authority to fill up and deliver the same to any person with whom he made a con-

tract, may make a preliminary parol contract of insurance binding upon his principal, to be consummated by filling and delivering a policy pursuant thereto. *Sanford v. Oriental Ins. Co.*, 174 Mass. 416 (54 N. E. Rep. 883; 75 Am. St. Rep. 358). In Kentucky it is held that a parol contract of insurance, or an agreement to renew an existing policy of insurance, made by the agent of an insurance company, is binding on it. *Klein v. Liverpool & London & Globe Ins. Co.*, Ky. (57 S. W. Rep. 250).

**Sec. 398. Miscellaneous notes.** An executor who negligently fails to procure from an insurer of property under his control an extension of a "vacancy permit" on the policy, which the insurer has agreed to issue, is liable for damages where the property is destroyed by fire at a time when the policy is avoided on account of the failure to procure such permit. *Henderson Trust Co. v. Stuart*, Ky (55 S. W. Rep. 1082; 48 L. R. A. 49; 21 Ky. Law Rep. 1664). An insurance policy on a store building, stock of merchandise, and store and office furniture and fixtures, in separate and distinct sums, is not invalidated as to the building and fixtures by the breach of an "iron safe clause" therein. *Hanover Fire Ins. Co. v. Crawford*, 121 Ala. 258 (25 So. Rep. 912; 77 Am. St. Rep. 55). Citing, *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53 (18 So. Rep. 86; 48 Am. St. Rep. 535). The mere fact that a saloon keeper does not conduct his business in strict compliance with the law of the state does not avoid a policy of insurance on the building in which such business is carried on, nor a policy which covers personal property therein. *Petty v. Mutual Fire Ins. Co.*, 111 Ia. 358 (82 N. W. Rep. 767). A policy of insurance on a building includes fixtures forming a part thereof, and the insurer is liable for their destruction to the extent they are not covered by other special insurance. *Niagara Fire Ins. Co. v. D. Heenan & Co.*, 181 Ill. 575 (54 N. E. Rep. 1052). Particular alterations in insured premises held to be such as to cause an increase in the risk so as to forfeit an insurance policy containing a clause avoiding it in case of making such alterations without the consent of the insurer. *Hill v. Middlesex Mut. Fire Assur. Co.*, 174 Mass. 542 (55 N. E. Rep. 319). Ky. Stat., § 700 construed and applied—liability of insurer in case



of total loss. *Aetna Ins. Co. v. Glasgow Elec. Light & Power Co.*, Ky. (52 S. W. Rep. 975; 21 Ky. Law Rep. 726).

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## IRRIGATION

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### EPITOME OF CASES.

**Sec. 399. Appropriation—Extent of right and priorities.** Under the claim alone of riparian rights the owner of the land cannot, to the injury of another riparian owner, take the water beyond the natural watershed of the stream for any purpose. *Bathgate v. Irvine*, 126 Cal. 135 (58 Pac. Rep. 442; 77 Am. St. Rep. 158). Under Mont. Civ. Code, § 1881, every appropriation of water must be made for a beneficial or useful purpose; and no one, by prior appropriation, can acquire exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses. *Toohy v. Campbell*, Mont. (60 Pac. Rep. 396)\* Capacity of ditch alone does not constitute a valid appropriation of water, unaccompanied by application of the water to some beneficial use. *Millheiser v. Long*, N. M. (61 Pac. Rep. 111). Particular facts held insufficient to impair the rights of a prior appropriator of water on account of his not having put the water appropriated by him to a beneficial use. *Mahoney v. Neiswanger*, Ida. (59 Pac. Rep. 561). A lower owner cannot acquire title to all the waters of a stream by a prior appropriation, as against an upper proprietor having title to his lands before the appropriation was made. *Bathgate v. Irvine*, 126 Cal. 135 (58 Pac. Rep. 442; 77 Am. St. Rep. 158). The right of a prior appropriator of water cannot be defeated to any portion thereof on the ground that he, by reason of a mistake as to the location of his boundary lines, has used a portion of such waters upon other land than his own. *Mahoney v. Neiswanger*, Ida. (59 Pac. Rep.

561). One having the paramount right to the use of water by reason of the prior appropriation is entitled to a sufficient quantity to irrigate the land he has in cultivation; and this right is to be measured by the owner's necessities and not by the capacity of the ditch. *Bowman v. Bowman*, 35 Or. 279 (57 Pac. Rep. 546). For particular cases determining priorities, see *Branstetter v. Williams*, Ida. (57 Pac. Rep. 433); *Herriman Irr. Co. v. Butterfield Min. Co.*, 19 Utah, 453 (57 Pac. Rep. 537; 51 L. R. A. 930, and note on "Use of natural streams to convey appropriated water"). *Millheiser v. Long*, N. M. (61 Pac. Rep. 111).

**Sec. 400. Appropriation of percolating or subsurface waters.** The supreme court of Utah, in an opinion collating and discussing the cases as to the nature of property in percolating waters, hold that the rules of law applying to the appropriation of surface waters do not apply thereto. *Willow Creek Irr. Co. v. Michaelson*, 21 Utah, 248 (60 Pac. Rep. 943; 51 L. R. A. 280). But the supreme court of California, in the case of *Vineland Irr. Dist. v. Azusa Irr. Co.*, 126 Cal. 486 (58 Pac. Rep. 1057; 46 L. R. A. 820), in which it is held that the subsurface flow of a stream is subject to appropriation, say: "We therefore hold it to be the law, and we think it to be a moderate and just exposition thereof, that one may, by appropriate works, develop and secure to useful purposes the subsurface flow to our streams, and become, with due regard to the rights of others in the stream, a legal appropriator of waters by so doing. That plaintiff thus was, at the time of the institution of its action, an appropriator, permits of no doubt, but its appropriation was legal only so far as its taking did not imperil or impair the rights of others superior to its own. One may not, of course, tunnel into the bed of such a stream, or dam its underground flow, and by such means draw away either subterranean or surface waters the rightful use to which has been secured by others. If, upon the other hand, one can, by development, obtain subterranean waters without injury to the superior rights of others, clearly he should be permitted to do so." The right of an owner of land to control percolating waters having their source in springs and marshes on his land ceases when the water passes into a stream with a well defined channel, as against a lower owner having a

prior right to appropriate the waters of such stream. *Boyce v. Cupper*, 37 Or. 256 (61 Pac. Rep. 642).

**Sec. 401. Adverse use of water.** One claiming the right to the use of water for irrigation on the ground of adverse user, has the burden of showing the necessary adverse use. *Lavery v. Arnold*, 36 Or. 84 (57 Pac. Rep. 906). No adverse use can be initiated until the persons possessing the superior use are deprived of its benefit in such a substantial way as to notify them that their rights are being invaded. *Bowman v. Bowman*, 35 Or. 279 (57 Pac. Rep. 546). An adverse use of water dates, not from the construction of the ditch, but from the time of the first application of the water to a beneficial use. *Lavery v. Arnold*, 36 Or. 84 (57 Pac. Rep. 906). To acquire a right to water by adverse use, the use must be continuous and without interruption by the one against whom the right is asserted. *Bree v. Wheeler*, 129 Cal. 145 (61 Pac. Rep. 782); *Brossard v. Morgan*, Ida. (61 Pac. Rep. 1031). In order to acquire a right to water by adverse possession in Utah, the use must have been, for seven years, continuous, uninterrupted, hostile, notorious, and adverse, and; to have been adverse, it must have been asserted under claim of title, exclusive of any other right. *Center Creek Water & Irr. Co. v. Lindsay*, 21 Utah, 192 (60 Pac. Rep. 559).

In the case of *Bathgate v. Irvine*, 126 Cal. 135 (58 Pac. Rep. 442; 77 Am. St. Rep. 158), the supreme court of California say: "No right to water can be acquired by prescription where the lower riparian proprietor has taken the water out of the stream at a point on his own land, and has used such water only as the upper riparian proprietor permitted it to pass down through his land to the lower owner. Such use by the latter is not adverse, in the sense required to give a right by prescription. Nor can the nonuser of the water by the upper riparian owner of land be invoked to strengthen the claim of appropriation or prescription by the lower riparian owner under like circumstances. In appropriating the water which flows across his land, the lower appropriator invades no right of the upper riparian proprietor. The latter has no right of action to prevent such use, for he is in no wise injured, and the former should not be permitted to acquire a right in this manner which the latter is powerless to

prevent." For particular case determining water rights asserted on account of adverse user, see *Fogarty v. Fogarty*, 129 Cal. 46 (61 Pac. Rep. 570).

**Sec. 402. Actions and adjudications concerning water rights.** A complaint in an action to protect a water right which states a good title will support a judgment taken by default. *Bailey v. Malheur & H. L. Irr. Co.*, 36 Or. 54 (57 Pac. Rep. 910). Tenants in common of an irrigation ditch may join in an action to restrain an interference therewith; and an allegation that its waters are necessary to irrigate and preserve the life of fruit trees, and that the threatened interference therewith would result in great and irreparable injury, is a sufficient allegation of irreparable damage. *Smith v. Stearns Rancho Co.*, 129 Cal. 58 (61 Pac. Rep. 662). In an action to recover damages for an alleged trespass on an irrigating ditch and to restrain interference therewith, one who, at the request of another defendant, tapped the ditches in question, and owns a tract of land across the corner of which one of the ditches is conducted, is a proper party. *Bowman v. Bowman*, 35 Or. 279 (57 Pac. Rep. 546). It is no defense to an action to compel recognition of one's decreed priorities that the water of a stream, if permitted to reach him, would do so slowly and after great loss in volume. *Lower Latham Ditch Co. v. Loudon Irr. Canal Co.*, 27 Colo. 267 (60 Pac. Rep. 629). One whose rights as a prior appropriator of water are fully preserved by a decree cannot complain of a finding therein that another is the owner of the water by virtue of riparian right, where he claims no such rights. *Smith v. Hawking*, 127 Cal. 119 (59 Pac. Rep. 295). Where, on an appeal in an action to determine the right to certain waters, the evidence is conflicting, and insufficient upon which to base a decree, the cause will be remanded, with directions to the trial court to permit the introduction of additional evidence in order to determine definitely the rights of parties. *Nephi Irr. Co. v. Vickers*, 20 Utah 310 (58 Pac. Rep. 836).

Colo. Gen. Stat., §§ 1762, 1766, providing for the adjudication of water rights, do not apply where the lands to be irrigated lie without the state, although the point of diversion is within the state. *Lamson v. Vailes*, 27 Colo. 201 (61 Pac. Rep. 231). Mills' Ann. Colo. Stat., § 2425 construed and applied—reargument and review of decree establishing water

rights. *Upper Platte & B. Canal Co. v. Ft. Morgan Res. & Irr. Co.*, 27 Colo. 214 (60 Pac. Rep. 484); *Crippen v. Burroughs*, 27 Colo. 155 (60 Pac. Rep. 487); *Rio Grande L. & C. Co. v. Prairie Ditch Co.*, 27 Colo. 225 (60 Pac. Rep. 726); *Daum v. Conley*, 27 Colo. 56 (59 Pac. Rep. 753). *Mills' Ann. Colo. Stat.*, §§ 2427-2429 construed and applied—appeal from adjudication of water rights. *Kerr v. Dudley*, 26 Colo. 457 (58 Pac. Rep. 610); *Upper Platte & B. Canal Co. v. Ft. Morgan Res. & Irr. Co.*, 27 Colo. 214 (60 Pac. Rep. 484); *Daum v. Conley*, 27 Colo. 56 (59 Pac. Rep. 753). *Colo. Laws* 1879, p. 100, § 19; *Laws* 1881, p. 159, § 34, construed and applied—jurisdiction of actions to adjudicate water rights—conclusiveness of proceedings. *Handy Ditch Co. v. South Side Ditch Co.*, 26 Colo. 333 (58 Pac. Rep. 30). *Wyo. Rev. Stat.* 1899, §§ 859-887 (*Laws* 1890-91, ch. 8) construed and applied—adjudication of water rights by state board of control—constitutionality of statute, and practice under it. *Farm Investment Co. v. Carpenter*, Wyo. (51 Pac. Rep. 258; 50 L. R. A. 747).

**Sec. 403. Conveyance of water rights.** A water right is a distinct subject of grant, and may be conveyed separate and apart from the land upon which it is utilized; but, nevertheless, whether a deed to such land conveys such right depends upon the intention of the grantor, to be determined from the terms of the deed, or, when the latter is silent as to such right, from the circumstances surrounding the transaction; and the mere fact that a deed conveying land is silent as to appurtenant water rights utilized by the grantor is not conclusive that he did not intend them to pass by his deed. The transfer of a water right, in order to avoid the statute of frauds, should be in writing, signed by the party making it; but a stranger to such agreement cannot object that it was not so evidenced. *Daum v. Conley*, 27 Colo. 56 (59 Pac. Rep. 753). Under *Utah Rev. Stat.* 1898, § 1281, the title to water rights appurtenant to the land pass by the conveyance of the land, unless expressly reserved in the deed. *Snyder v. Murdock*, 20 Utah, 419 (59 Pac. Rep. 91). For a discussion as to when a water right will be deemed to be appurtenant to land in connection with which it is used, see *Smith v. Denniff*, 24 Mont. 20 (60 Pac. Rep. 398; 50 L. R. A. 737). An alien taking a conveyance of land from a citizen of the United

States succeeds to the rights of the latter acquired as the original appropriator of water for irrigation. *Lavert v. Arnold*, 36 Or. 84 (57 Pac. Rep. 906). A corporation taking a conveyance of an irrigation plant from an association and individuals owning it, takes the property subject to an easement existing against it in favor of a third person. *Beck v. Pasadena Lake Vineyard Land & Water Co.*, Cal. (59 Pac. Rep. 387).

**Sec. 404. Miscellaneous notes—Statutes construed.** For a clear and exhaustive opinion defining and discussing what constitutes a water right and how it may be acquired, see *Smith v. Denniff*, Mont. (60 Pac. Rep. 398; 50 L. R. A. 737). See 50 L. R. A. 737-747 for extensive note on "State and Federal Ownership of Waters." For cases determining the water rights of parties under particular contracts, see *Wright v. Platte Val. Irr. Co.*, 27 Colo. 322 (61 Pac. Rep. 603); *Sample v. Fresno Flume & Irr. Co.*, 129 Cal. 222 (61 Pac. Rep. 1085); *Mayberry v. Alhambra Add. Water Co.*, 125 Cal. 444 (58 Pac. Rep. 68). Before an appropriator of water can be enjoined for diversion by an appropriator farther down the stream, it must satisfactorily appear that, had the water been allowed to pass down the stream, it would have reached plaintiff's ditch. *West Point Irr. Co. v. Moroni & Mt. Pleasant Irr. Ditch Co.*, 21 Utah, 229 (61 Pac. Rep. 16). Acquiescence by an occupant of land for six years in the diversion of water in accordance with a change made in the point of diversion by the appropriator estops the occupant to question the appropriator's right, on the ground that he was guilty of trespass in making the change. *Miller v. Douglas*, Ariz. (60 Pac. Rep. 722). Particular acquiescence in the diversion of water held not to deprive one of his decreed priorities. *Lower Latham Ditch Co. v. Loudon Irr. Canal Co.*, 27 Colo. 267 (60 Pac. Rep. 629). Cal. Laws 1887, p. 29; Laws 1899, p. 212 construed and applied—organization and government of irrigation districts. *People v. Linda Vista Irr. Dist.*, 128 Cal. 477 (61 Pac. Rep. 86). Cal. Stat. 1887, p. 29, §§ 33, 36, 39 construed and applied—settlement by collector of board of irrigation. *Perry v. Otay Irr. Dist.*, 127 Cal. 565 (60 Pac. Rep. 40). Neb. Comp. Stat. 1897, ch. 93a, § 58, which assumes to exempt irrigation companies from the operation of the general law requiring rail-

road corporations, canal companies, etc., to erect and maintain bridges and crossings on the highways where their roads, canals or ditches cross such highways, is special legislation, and, being in violation of the constitution, is void. *State v. Farmers' & Merchants' Irr. Co.*, 59 Neb. 1 (80 N. W. Rep. 52). N. Mex. Comp. Laws 1897, §§ 468-493 (Laws 1887, ch. 12) construed and applied—power of irrigation companies to exercise right of eminent domain, and manner of exercise. *Albuquerque Land & Irr. Co. v. Gutierrez*, N. M. (61 Pac. Rep. 357). Utah Laws 1884, p. 127; Laws 1897, p. 225, ch. 52, § 27 construed and applied—organization of irrigation districts—duty of trustees. *Harris v. Tarbet*, 19 Utah, 328 (57 Pac. Rep. 33). 1 Utah Comp. Laws 1888, art. 4, § 16 construed and applied—right of municipality to exclusive control and regulation of water within its limits. *Fisher v. Bountiful City*, 21 Utah, 29 (59 Pac. Rep. 520).

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## JUDICIAL SALES

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### EPITOME OF CASES.

**Sec. 405. Confirmation.** A decree confirming a sale founded on a false report thereof may be impeached by an interested party who is not guilty of culpable fraud or neglect. *Springston v. Morris*, 47 W. Va. 50 (34 S. E. Rep. 766). A court with knowledge of all the facts, in its discretion, may confirm a guardian's sale made to his wife, it not appearing that the sale otherwise was unfair. *Strauss v. Bendheim*, 162 N. Y. 469 (56 N. E. Rep. 1007). Ky. Stat., § 988 construed and applied—jurisdiction of court over order confirming report of sale. *Schlosser v. Murnan*, Ky. (49 S. W. Rep. 421; 20 Ky. Law Rep. 1468).

**Sec. 406. Withdrawal of bid—Liability of purchaser for failure to complete purchase.** A bidder may withdraw his bid at any time before the officer makes the memorandum necessary to make the sale binding. *Dunham v. Hartman*,

153 Md. 625 (55 S. W. Rep. 233; 77 Am. St. Rep. 741). Citing, *Pike v. Balch*, 38 Me. 302 (61 Am. Dec. 248); *Gwathney v. Cason*, 74 N. C. 5 (21 Am. Rep. 484). A purchaser who refuses to complete his purchase is liable for the difference between his bid and the amount the property may bring at a resale, *Napper v. Mutual Life Ins. Co.*, Ky.

(53 S. W. Rep. 28; 21 Ky. Law Rep. 791); but in order to render him so liable, it must appear that the same property for which he bid was actually resold, *Smith v. Roberts*, 106 Ga. 409 (32 S. E. Rep. 375). In an action against such a purchaser, he may show by parol evidence the terms and conditions under which he purchased, for the purpose of establishing that these terms and conditions were not the same as those which governed the resale. *Hammond v. Cailleaud*, 128 Cal. XVIII (60 Pac. Rep. 523).

**Sec. 407. Title and rights of purchaser—Liability for taxes.** The rule of caveat emptor applies to judicial sales. *Ezell v. Brown*, 121 Ala. 150 (25 So. Rep. 832); *Schlosser v. Murnan*, Ky. (49 S. W. Rep. 421; 20 Ky. Law Rep. 1468). Applying this rule, it is held that the failure of a purchaser to obtain title to a valuable spring on the land sold does not entitle him to an abatement of the purchase price. *Fox v. McGoodwin's Adm'r*, Ky. (56 S. W. Rep. 515; 21 Ky. Law Rep. 1776). A provision in a decree directing the sale of real estate to pay the purchase price thereof, excepting from its operation a sawmill forming a part of the land, cannot be attacked collaterally; and a purchaser at a sale under such decree acquires no title to the mill. *First Nat. Bank v. Hyer*, 46 W. Va. 13 (32 S. E. Rep. 1000). A purchaser of land at a judicial sale thereof is not liable for the taxes upon the land sold which accrued after its sale but before confirmation thereof; but they become a lien upon the land and it cannot be claimed exempt therefrom on the ground that the property of the purchaser was exempt by statute from taxation. *German Bank v. City of Louisville*, Ky. (56 S. W. Rep. 504).

**Sec. 408. Effect of reversal of decree on title of purchaser.** Ind. Rev. Stat. 1894, § 681 (Rev. Stat. 1901, § 681), providing that "the reversal of any judgment by virtue of which any real estate has been sold or transferred, or the



title thereto affirmed, shall not avoid the sale, transfer or title, if the person to be affected thereby shall be, or claim under, a purchaser in good faith and not a party to the record or attorney of any party," does not operate to protect the title of the plaintiff in foreclosure proceedings who purchases at his own sale, but a reversal of the decree renders the sale void and leaves the parties as though no judgment had been rendered. *Butler v. Thornburg*, 153 Ind. 530 (55 N. E. Rep. 417). Upon the reversal of a judgment against a defendant for debt, on the ground that he owed no part of the debt, in pursuance of which judgment the property of the defendant was sold on execution and purchased by the plaintiff's attorney, he must either restore the land or account for its value, as he is not entitled to be protected as a stranger; but he may recover the price paid less rents and profits received by him. *Cavanaugh v. Willson*, Ky. (57 S. W. Rep. 620). Under W. Va. Code 1891, ch. 132, § 8, the title of one purchasing under a decree or order of sale, who is not a party thereto, will not fall with the reversal or setting aside of the decree. *Frederick v. Cox*, 47 W. Va. 14 (34 S. E. Rep. 958). See *Ballard's Law of Real Property*, Vol. VII, § 404. A purchaser of land ordered sold under a judgment sustaining an attachment of it, pending an appeal from the judgment, must restore the property upon a reversal of the decree to one who purchased the land from the attachment defendant before the judgment. *Spicer v. Seale*, Ky. (50 Pac. Rep. 47; 20 Ky. Law Rep. 1869).

The title of one who purchases property from a purchaser at a foreclosure sale after a decree confirming the same and ordering an execution of the conveyance, is not affected by a reversal of such decree on an appeal pending at the time of his purchase, but which was taken without a supersedeas bond. *Evans v. Kahr*, 60 Kan. 719 (57 Pac. Rep. 950; 58 Pac. Rep. 467). The court say: "It is important that property offered for sale in such cases should bring the highest price after competition, and to permit interference with the sale after confirmation, upon a review of the proceedings in a higher court, which might be delayed years after the purchase, without supersedeas bond, would have the effect of making bidders timid, for they would remain in a state of insecurity as to their titles until the final disposition in the

court of review. In *Freem. Judgm.* (4th Ed.) § 484, it is said: 'The law permits judgments and decrees to be in force during the time in which appeals may be taken, and also while appeals are pending and undetermined, unless some bond or other security given as required by law operates to stay proceedings. Courts have always construed the law so as to impart confidence in judicial sales, by protecting purchasers thereat from those ill consequences which the latter might suffer if the title acquired by them depended upon the freedom of prior proceedings from all errors of law. It was thought to be unjust to require purchasers to suffer for errors committed by the judges of subordinate courts, and impolitic, by making such requirements, to discourage bidders at such sales, and thereby to expose large amounts of property to the hazard of being sacrificed at nominal prices. Therefore, it is a rule, nowhere disputed, that third persons, purchasing at a sale made under the authority of a judgment or decree not suspended by any stay of proceedings, thereby acquire rights which no subsequent reversal of such judgment or decree can in any respect impair; nor is the fact that the purchasers are notified not to purchase because the judgment was claimed to be erroneous, and that an attempt would be made to procure its reversal, of any consequence.' The above rule stated tends to the security of titles. It is laid down in the books as a general rule that when the purchaser at a sheriff's sale is an innocent third person, and is a bona fide purchaser, who has paid the purchase price before obtaining knowledge of the reversal of the judgment, he shall be protected in his title to the property, notwithstanding the reversal of the judgment. *Ror. Jud. Sales*, §§ 1142, 1143; *Smith v. Dixon*, 27 O. St. 471; *Runge v. Brown*, 29 Neb. 116-122 (45 N. W. Rep. 271); *McAustland v. Pundt*, 1 Neb. 211 (93 Am. Dec. 358)."

**Sec. 409. Vacation of sale on offer of increased bid.**

In order for a sale to be set aside on account of an offer of an increased bid, the party offering to make the advanced bid either should bring the money into court or give a bond or guaranty that he will make the bid. *Quigley v. Breckenridge*, 180 Ill. 627 (54 N. E. Rep. 580). The right to refuse confirmation of a judicial sale on account of an offer of an advanced bid of ten per cent. of the price bid at the sale is within the legal discretion of the court; and, as a general rule,

a bidder at the sale will not be permitted to put in such a bid. *Moore v. Triplett*, 96 Va. 603 (32 S. E. Rep. 50; 70 Am. St. Rep. 882). See *Ballards' Law of Real Prop.*, Vol. VII, § 405.

**Sec. 410. Setting aside sale—Fraud and irregularities.**

A bid may be made by the agent of the bidder, *Quigley v. Breckenridge*, 180 Ill. 627 (54 N. E. Rep. 580); and no fraud appearing in the transaction, a judicial sale will not be set aside because made to an absent bidder whose bid was duly announced by the auctioneer making the sale, *James v. Kelley*, 107 Ga. 446 (33 S. E. Rep. 425; 73 Am. St. Rep. 135). Any arrangement made for the purpose of reducing competition at a judicial sale is fraudulent and void, and if the purchaser at such sale is a party to such an arrangement he cannot take any benefit under the purchase, and the sale will be set aside by the court. The existence of such an arrangement is not established where the evidence of the parties between whom it is alleged to have been made is directly contradictory as to the making of the agreement. *Quigley v. Breckenridge*, 180 Ill. 627 (54 N. E. Rep. 580).

**Sec. 411. Setting aside sale—Inadequacy of price.**

Mere inadequacy of price alone is not sufficient to set aside a judicial sale, *Owens v. Owens*, Ky. (52 S. W. Rep. 822; 21 Ky. Law Rep. 625); unless it is so great as to amount to evidence of fraud, *Clark v. Glos*, 180 Ill. 556 (54 N. E. Rep. 631; 72 Am. St. Rep. 223). Where a sale is made for a grossly inadequate price only slight evidence of additional fraud or irregularity in the sale will be required in order to set it aside. *Henderson v. Harness*, 184 Ill. 520 (56 N. E. Rep. 786); *Owens v. Owens*, Ky. (52 S. W. Rep. 822; 21 Ky. Law Rep. 625). An execution sale made for a grossly inadequate price and unattended by the execution debtor because he was justified in believing from the conduct of his execution creditor that he would not seek enforcement of his execution by sale, will be set aside. *Raphael v. Zehner*, 56 N. J. Eq. 836 (42 Atl. Rep. 1015). A sale of property worth \$12,000 for \$10,400, does not show such inadequacy of price as amounts to a fraud. *Quigley v. Breckenridge*, 180 Ill. 627 (54 N. E. Rep. 580).

# LANDLORD AND TENANT

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## EPITOME OF CASES.

**Sec. 412. As to when the relation exists.** The relation of landlord and tenant may exist between two parties, although the landlord really is not the owner of the premises rented, but is himself a tenant of the owner. *Strickland v. Stiles*, 107 Ga. 308 (33 S. E. Rep. 85). The relation of master and servant and not that of landlord and tenant is created by the occupancy of a house and garden by a farm hand as a part of the compensation due him from his employer. *Heffelfinger v. Fulton*, 25 Ind. App. 33 (56 N. E. Rep. 688). Citing, *Bowman v. Bradley*, 151 Pa. St. 351 (24 Atl. Rep. 1062; 17 L. R. A. 216); *Kerrains v. People*, 60 N. Y. 221 (14 Am. Rep. 158); *Edgar v. Jewell*, 34 N. J. Law, 259; *Haywood v. Miller*, 3 Hill. 90; *Lightbody v. Truelsen*, 39 Minn. 310 (40 N. W. Rep. 67). A contract under which one person is to cultivate another's vineyard, gather and market the crop, and take his compensation out of the proceeds, the surplus to be returned to the owner, no time being fixed for termination of possession, is not a lease, but a contract of employment, though it states that the owner leased the vineyard to the other. *Ferris v. Hoagland*, 121 Ala. 240 (25 So. Rep. 834). Particular agreement held to create the relation of landlord and tenant. *Rakestraw v. Floyd*, 54 S. C. 288 (32 S. E. Rep. 419).

**Sec. 413. Estoppel to deny title.** A tenant entering into possession under a lease is estopped to deny the title of his landlord, *Ballance v. City of Peoria*, 180 Ill. 29 (54 N. E. Rep. 428); and the estoppel extends to all who succeed to the possession from or through the tenant, *Fleming v. Mills*, 182 Ill. 464 (55 N. E. Rep. 373); *State v. Griftner*, 61 O. St. 201 (55 N. E. Rep. 612); *Ballance v. City of Peoria*, 180 Ill. 29 (54 N. E. Rep. 428). The doctrine that a lessee cannot dispute his landlord's title extends to one who takes possession under a contract of purchase. *Curran v. Banks*, 123 Mich. 594 (82 N. W. Rep. 247). A lessee of a trustee in a deed of

trust which gave him power to execute a lease for a term not exceeding the life of the beneficiary, is estopped to deny the lessor's title in an action brought by him to recover rents accruing after the death of the beneficiary, which event terminated the trustee's title, where the lessee has not been disturbed in his possession and no person other than the lessor has asserted any right to the rents. *Ashton v. Golden Gate Lum. Co.*, Cal. (58 Pac. Rep. 1).

Upon the subject of a tenant's estoppel to deny his landlord's title, the supreme court of Michigan in the case of *Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416 (79 N. W. Rep. 635), say: "An estoppel of the tenant arises out of indentures under seal, or from possession given, whereby an advantage is derived by the tenant from the act of the landlord. But where one in possession agrees by parol, or by an instrument not under seal, to rent, there is no just ground for denying the right of such tenant to show that the agreement was made under a mistake of fact, that the title of the property was in himself, and the lease therefore without consideration. *Fuller v. Sweat*, 30 Mich. 237; *Tayl. Landl. & Ten.* § 707, and the cases cited in note." A tenant may show that his landlord's title has terminated, *Sheaff v. Husted*, 60 Kan. 770 (57 Pac. Rep. 976); and he may purchase the leased premises at an execution sale thereof against his landlord, *Smith v. Scanlan*, Ky. (51 S. W. Rep. 152; 21 Ky. Law Rep. 169).

Where a tenant purchases the fee, his estoppel to deny the landlord's title ceases. *Wade v. South Penn Oil Co.*, 45 W. Va. 380 (32 S. E. Rep. 169). Where the title of a landlord who claims as a purchaser of public land from the state has been forfeited on account of his nonpayment of interest his tenant may acquire the title. *Lang v. Crothers*, 21 Tex. Civ. App. 118 (51 S. W. Rep. 271). A tenant of the owner of the fee simple title to real estate is not estopped from attorning to a third person holding a tax deed to the property regular on its face. *Sheaff v. Husted*, 60 Kan. 770 (57 Pac. Rep. 976).

**Sec. 414. Forfeiture.** A lessor does not waive his right to enforce a forfeiture by his subsequent acceptance of rent which accrued prior to the time of the forfeiture. *Morrison v. Smith*, 90 Md. 76 (44 Atl. Rep. 1031). Equity will not relieve against the forfeiture of a lease for breach of covenant, when the breach has been culpable, long persisted in,

and detrimental. *Bacon v. Park*, 19 Utah, 246 (57 Pac. Rep. 28).

**Sec. 415. Tenancy at will.** One who is placed on land without a term prescribed, or without any terms prescribed or rent reserved, but as a mere occupier, is a tenant at will. There must be a demand for possession before action is brought in order to terminate such a possession. *Zilch v. Young*, 184 Ill. 333 (56 N. E. Rep. 318). A tenant who enters and continues in possession of the demised premises under a written lease until the expiration of the term does not thereafter become a tenant at will by refusing to surrender that possession, and by holding over without the consent of the lessor, so as to be entitled to notice to quit as such, under Cal. Code Civ. Proc., § 1162. *Kuhn v. Smith*, 125 Cal. 615 (58 Pac. Rep. 204; 73 Am. St. Rep. 79). Under Ia. Code § 2991, a tenant from year to year who continues in possession after the termination of his lease with the consent of the landlord becomes a tenant at will. *German State Bank v. Herron*, 111 Ia. 25 (82 N. W. Rep. 430). Under Ky. Stat., § 2336, a tenant at will cannot be dispossessed by an action of ejectment until notice has been given him to remove. *Howard v. Blanton* Ky. (49 S. W. Rep. 461; 20 Ky. Law Rep. 1441).

**Sec. 416. Tenancy from year to year.** Under Ind. Rev. Stat. 1894, § 7089 (Rev. Stat. 1901, § 7089) a general tenancy without any agreement as to when it shall terminate constitutes a tenancy from year to year, *City of Michigan City v. Leeds*, 24 Ind. App. 271 (55 N. E. Rep. 799); and under this statute it is held that when possession is taken under an oil and gas lease providing for the payment of an annual rent, but which does not contain any definite stipulation as to its termination, a tenancy from year to year is created which may be terminated at the end of any year. *Diamond Plate-Glass Co. v. Echelbarger* 24 Ind. App. 124 (55 N. E. Rep. 233). Where land is rented to a tenant for one year at a stipulated rental, and after the expiration of the term the tenant, without further contract, remains in possession, and pays the rental annually at the agreed rate, a tenancy from year to year is created. *Roberson v. Simons*, 109 Ga. 360 (34 S. E. Rep. 604). For particular case in which the evidence is held to establish a

tenancy from year to year, see *Cunningham v. Roush*, 157 Mo. 336 (57 S. W. Rep. 769).

**Sec. 417. Holding over.** When a tenant, with the consent of his landlord, express or implied, holds over his term, the law implies a continuation of the original tenancy upon the same terms, conditions and covenants as in the original lease. The effect of a holding over and payment of rent by a lessee to create a renewal cannot be avoided by the lessor showing that the rent payments were made to his agent who was not authorized to receive. *Lewis v. Perry*, 149 Mo. 257 (50 S. W. Rep. 821). A tenant holding over after the expiration of his lease under an oral agreement with his landlord that he might do so will be deemed to hold possession of the premises under the terms of the lease. *Faxon v. Jones*, 176 Mass. 138 (57 N. E. Rep. 360). In Ohio when a tenant holds over after the expiration of any year, the landlord has the option to treat him as a tenant for another year, or as a trespasser; and, unless there has been an election to treat him as a tenant, possession may be recovered by the landlord in an action of forcible detention, after the service of the three-days notice required by the statute. *Gladwell v. Holcomb*, 60 O. St. 427 (54 N. E. Rep. 473; 71 N. E. Rep. 724). If a lease be made to several persons for a definite period, and one of them acting for himself only, remains in possession of the demised premises after the end of the term, he alone becomes the tenant holding over, and notice to quit, addressed to him alone, will be sufficient to terminate the tenancy resulting from his continuance in possession. *Tice v. Cowenhoven*, 63 N. J. L. 24 (42 Atl. Rep. 1054). Where a lease for a term of years contains a covenant on the part of the lessor that at the expiration of the term the lessee shall be paid the appraised value of the building, or a new lease at an appraised rent shall be granted, the lessee at the expiration of the term is entitled to retain the possession until the covenant shall be performed by the lessor. This binds both the lessor and the lessee. The lessee is not, however, discharged from the payment of the rent, but in an action for use and occupation the lessor can recover no more than the rent originally reserved. *Van Beuren v. Wotherspoon*, 164 N. Y. 368 (57 N. E. Rep. 633).

**Sec. 418. Termination of relations—Notice to quit.**

Where there is a lease for years with rent, and an option to purchase the fee, an election to purchase under the option, and tender of the purchase price under it, ends the lease and its rent. *Wade v. South Penn Oil Co.*, 45 W. Va. 380 (32 S. E. Rep. 169). A tenant is justified in terminating his lease and abandoning the premises where, through the acts of his landlord, injuries have been done the building which practically render it useless for the purpose for which it was rented. *Adams v. Werner*, 120 Mich. 432 (79 N. W. Rep. 636); *Prior v. Sanborn*, 12 S. Dak. 86 (80 N. W. Rep. 169). Where a tenant without fault on the part of his landlord abandons the premises the latter may re-enter and re-rent the premises, crediting the former with the proceeds; but his so taking possession does not relieve the tenant from liability for the stipulated rent. *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421 (56 N. E. Rep. 807; 75 Am. St. Rep. 181). A landlord's acceptance of a surrender of the premises from a subtenant under an agreement providing for the satisfaction out of the latter's property of all rent up to the date of the surrender, operates to terminate the lease and discharge the lessees from further liability for rent thereunder, and the landlord afterward cannot withhold money deposited by them to secure payment for the rent for the entire period of the lease. *Carson v. Arvantes*, 27 Colo. 77 (59 Pac. Rep. 737). Under a lease stipulating for the monthly payment of a specified sum as rent, and that, "should any payment fail to be made at or within thirty days after its maturity, the lease may be terminated at the option of" the landlord, a demand for possession of the premises, made immediately after a failure to pay a month's rent, which had been due for more than thirty days, was, in substance, an exercise of such option, although at the time of demanding the rent for that month the rent for the succeeding month, which, though due, had not been so for thirty days, was also demanded. *McCroskey v. Hamilton*, 108 Ga. 640 (34 S. E. Rep. 111; 75 Am. St. Rep. 79). Under Ia. Code § 2991, thirty days notice in writing must be given either by the landlord or tenant before he can terminate the tenancy at will; and a conveyance of premises by the landlord does not terminate such tenancy. *German State Bank v. Herron*, 111 Ia. 25 (82 N. W. Rep. 430). Under Ind. Rev. Stat. 1894, § 7088 (Rev. Stat. 1901, § 7088), no notice to quit is necessary to terminate a



tenancy of one who fails to pay rent in advance in accordance with the express terms of the lease. *Ingalls v. Bissot*, 25 Ind. App. 130 (57 N. E. Rep. 723). Notice to quit is not necessary to terminate a tenancy from year to year arising from the tenant holding over after his term. *Gladwell v. Holcomb*, 60 O. St. 427 (54 N. E. Rep. 473; 71 Am. St. Rep. 724).

**Sec. 419. Surrender.** If a lessee for life or years takes a new lease of the reversioner for a longer or shorter term than before, it is a surrender of the first lease. *Wade v. South Penn Oil Co.*, 45 W. Va. 380 (32 S. E. Rep. 169). The subsequent reletting by a lessor of premises which have been abandoned by a prior lessee whose offer to surrender has been refused creates a surrender by operation of law. And the operation of this rule is not avoided by the failure of the original lessee to make any reply to statements in letters written to him by the lessor after he has abandoned the premises, to the effect that they will be leased at his risk. *Gray v. Kaufman Dairy & Ice-Cream Co.*, 162 N. Y. 388 (56 N. E. Rep. 903; 49 L. R. A. 580; 76 Am. St. Rep. 327). In support of the first proposition the court say: "It is so well settled as to be almost axiomatic that a surrender of premises is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made. It has been held in this state that 'a surrender is implied, and so effected by operation of law within the statute, when another estate is created by the reversioner or remaindermen, with the assent of the termor, incompatible with the existing state or term.' *Coe v. Hobby*, 72 N. Y. 145 (28 Am. Rep. 120). The existence of this rule has been recognized in this state in *Bedford v. Terhune*, 30 N. Y. 463 (86 Am. Dec. 394); *Smith v. Kerr*, 108 N. Y. 36 (15 N. E. Rep. 70; 2 Am. St. Rep. 362); *Underhill v. Collins*, 132 N. Y. 271 (30 N. E. Rep. 576), —and in other jurisdictions in *Beall v. White*, 94 U. S. 389 (24 L. Ed. 173); *Amory v. Kannoisky*, 117 Mass. 351 (19 Am. Rep. 416); *Thomas v. Cook*, 2 Barn. & Ald. 119; *Nickells v. Atherstone*, 10 Q. B. 944; *Lyon v. Reed*, 13 Mees. & W. 306; and 1 Washb. Real Prop. pp. 477, 478." For particular fact cases illustrating what constitutes a surrender by a lessee, see *Buckingham Apartment House Co. v. Dafoe*, 78 Minn.

268 (80 N. W. Rep. 974); *Steketee v. Pratt*, 122 Mich. 80 (80 N. W. Rep. 989).

**Sec. 420. Appropriation of leased premises under right of eminent domain.** The taking of leased property under the right of eminent domain, although at the instigation of the owner of the reversion, does not constitute a breach of the lessor's covenant for quiet enjoyment. *Goodyear Shoe Machinery Co. v. Boston Terminal Co.*, 176 Mass. 115 (57 N. E. Rep. 214). A tenant of premises appropriated for a public purpose is liable for rent up to the time his possession is disturbed under the order of appropriation. *Devine v. Lord*, 175 Mass. 384 (56 N. E. Rep. 570). The grantee of a lessor may avail himself of a stipulation in a lease that it shall be subject to termination at the election of the lessor or those claiming under him in case the property is taken under the right of eminent domain, and he may assert this right upon condemnation of the property under proceedings instituted by himself, and such a condemnation is not a violation of the lessor's covenant for quiet enjoyment. *Goodyear Shoe Machinery Co. v. Boston Terminal Co.*, 176 Mass. 115 (57 N. E. Rep. 214).

**Sec. 421. Wrongful eviction by landlord and eviction for non-payment of rent.** When the premises become untenable by reason of the landlord's failure to do what is lawfully required of him, the effect is eviction, which permits the tenant to abandon the premises. *Prior v. Sanborn Co.*, 12 S. Dak. 86 (80 N. W. Rep. 169); *Adams v. Werner*, 120 Mich. 432 (79 N. W. Rep. 636). A tenant may recover damages for breach of covenant for quiet enjoyment where his enjoyment and use of the premises is interfered with by acts of his landlord. *Boyer v. Commercial Bldg. Inv. Co.*, 110 Ia. 491 (81 N. W. Rep. 720). A lessee who yields his possession to a third person cannot maintain an action on the covenants in his lease as for an eviction without showing that the person to whom the possession was yielded has title paramount to that of the lessor. *Stiger v. Monroe*, 109 Ga. 457 (34 S. E. Rep. 595). A lessor having a right to terminate a lease for a term of years upon giving notice to the lessee of his desire to quit using the land for the purpose for which it was leased, who effects a termination of the lease by giving a false notice of his intention as to the use of the premises, may be held liable as for an evic-

tion and the lessee may recover such damages as naturally and approximately result therefrom. *Salzgaber v. Mickel*, 37 Or. 216 (60 Pac. Rep. 1009). A landlord cannot maintain an action to dispossess his tenant for nonpayment of rent during the pendency of garnishment proceedings against the tenant by the landlord's creditor in which the rent is sought to be held, where the statute (How. Ann. Mich. Stat., § 8050) suspends a creditor's right to action for money garnisheed during the pendency of the proceedings. *O'Connor v. White*, 124 Mich. 22 (82 N. W. Rep. 664).

**Sec. 422. Farming on the shares—Title to crops.** A contract for farming on the shares does not make the parties partners so as to give the survivor the powers of a surviving partner. *Shrum v. Simpson*, 155 Ind. 160 (57 N. E. Rep. 708; 49 L. R. A. 792). Parties to a contract for farming on the shares which provides for the partition of crops are tenants in common of the crops until they are divided, *Rohrer v. Babcock*, 126 Cal. 222 (58 Pac. Rep. 537); and an order by the landlord to the tenant to pay the rent to a third person amounts to an assignment of the landlord's share of the growing crops and makes such third person a cotenant with the tenant in the crops with all the rights of the landlord in such crops, *Curtner v. Lyndon*, 128 Cal. 35 (60 Pac. Rep. 462). Where such a contract provides for the stacking of the landlord's portion of the hay raised thereunder in a certain place, the stacking of one-half the hay at such place amounts to a division and gives him complete ownership. *Rohrer v. Babcock*, 126 Cal. 222 (58 Pac. Rep. 537). The owner of land who has leased it to a tenant for a share of the crop may sue for a tort of a wrongdoer damaging the growing crop. *Neal v. Ohio River R. Co.*, 47 W. Va. 316 (34 S. E. Rep. 914).

**Sec. 423. Landlord's lien—Priority—Statutes construed.** A lessor's right to enforce a lien against personal property given him by his lease to secure the payment of rent, passes to a third party without assignment of the lease to whom he has transferred his claim for accrued rent. *Ramsey v. Johnson*, 8 Wyo. 476 (58 Pac. Rep. 755; 80 Am. St. Rep. 948). The priority of a lessor's lien for rent and his right to enforce it is not affected by the appointment of a receiver for the lessee. *Lane v. Washington Hotel Co.*, 190 Pa. St. 230 (42 Atl. Rep.

697). A landlord is liable in damages for suing out an injunction against his tenant to prevent his selling or removing property from the premises for the purpose of harrassing him, although he held a lien on the property, where his claim is amply secured by attachment. *Beach v. Williams*, Ia. (79 N. W. Rep. 393). Ga. Civ. Code, § 2798 construed and applied—transfer of landlord's lien by assignment of rental contract. *Strickland v. Stiles*, 107 Ga. 308 (33 S. E. Rep. 85). Construing and applying Ia. Code, § 2991, requiring thirty days notice in writing to terminate a tenancy at will, it is held that the lien of the landlord reaches ahead only for the term required to terminate the tenancy. *German State Bank v. Herron*, 111 Ia. 25 (82 N. W. Rep. 430). Ia. Code, § 2992, giving a landlord a lien upon "crops grown on the leased premises, and upon any other personal property of the tenant which has been kept thereon during the term, not exempt from execution," does not give him a lien upon the individual property of a member of a firm which holds the property as lessee. *Ward v. Walker*, 111 Ia. 611 (82 N. W. Rep. 1028). Ia. Code, § 2992 construed and applied—landlord's lien on crops—pleading and practice in action for conversion. *Church v. Bloom*, 111 Ia. 319 (82 N. W. Rep. 794). A lien for rent given a lessor by Ky. Stat., §§ 2305, 2307, 2314, 2316 2317, on the personal property of the lessee and the assignee of the lease, cannot be defeated by the latter setting up the fact that the assignment was invalid because made without the consent of the lessor, where he acquiesced in it, nor can it be avoided by such assignee making an assignment for creditors. *Hazelrigg, C. J., and Du Relle and Guffy, JJ., dissenting. Myer Bros.' Assignee v. Gaertner*, Ky. (50 S. W. Rep. 971; 45 L. R. A. 513; 21 Ky. Law Rep. 52). S. C. Rev. Stat., §§ 2512, 2517 construed and applied—enforcement of landlord's lien for rent—bond. *Barnes v. Bamberg*, 55 S. C. 499 (33 S. E. Rep. 580).

**Sec. 424. Landlord's lien—Waiver of.** A stipulation in a lease giving a lessor a lien upon furniture placed upon the premises by the lessee as security for the rent, creates an equitable lien which should be enforced as such, and the lessor by bringing an action for his rent and attaching the furniture thereby waives the lien given him by the lease. *Potter v. Greenleaf*, 21 R. I. 483 (44 Atl. Rep. 718). If a landlord authorize his tenant to sell crops upon which the statute gives him a lien

for rent and account to him for the proceeds, he thereby waives his lien and cannot recover the value of the crops from the purchaser thereof, although his rent has not been paid; but a contract stipulating that the tenant shall deliver the crops raised at a designated point, does not, of itself, authorize the tenant to sell such crops. *Campbell v. Bowen*, 22 Ind. App. 562 (54 N. E. Rep. 409). For construction of particular agreement waiving landlord's lien, see *Varner v. Ross*, 121 Ala. 603 (25 So. Rep. 725).

**Sec. 425. Agricultural lien for advancements.** A lien given by a landlord for supplies on his tenant's crops, by Sand. & H. Ark. Dig., § 4795, is not good as against a purchaser of the crop from the tenant in good faith without notice of the lien. *Hunter v. Matthews*, 67 Ark. 362 (55 S. W. Rep. 144). Ga. Civ. Code, §§ 2800, 2816 construed and applied—foreclosure of landlord's lien for supplies—necessity of demand. *Vaughn v. Strickland*, 108 Ga. 659 (34 S. E. Rep. 192). In construing a contract between a landlord and tenant giving the former a lien upon the crops of the latter for supplies furnished the tenant by the landlord to make the crops, the term "supplies" will include money furnished by the landlord and used by the tenant in making and gathering the crops. *Strickland v. Stiles*, 107 Ga. 308 (33 S. E. Rep. 85). Ky. Stat., §§ 2323, 2324 construed and applied—lien on crop for advances—priority and enforcement. *Brown v. Noel*, Ky. (52 S. W. Rep. 849; 21 Ky. Law Rep. 648). Neither a seal nor an attestation is necessary to the validity of an agreement for an agricultural lien for advances, under S. C. Rev. Stat., § 2514. *Brown v. Young*, 55 S. C. 309 (33 S. E. Rep. 357).

**Sec. 426. Repairs.** In the absence of a covenant to that effect a lessor is not bound to keep the leased premises in repair. *Stephens v. Wadleigh*, Ariz. (57 Pac. Rep. 622). A tenant cannot recover speculative damages in an action for a breach of his lessor's contract to make repairs. *Mason v. Howes*, 122 Mich. 329 (81 N. W. Rep. 111). A tenant who has leased premises at a stipulated rent upon the landlord's agreement to repair certain obvious defects cannot recover damages for injury to his health on account of the landlord's failure to make such repairs. *Hanson v. Cruse*, 155 Ind. 176 (57 N. E. Rep. 904). A tenant may waive a breach of his

landlord's agreement to repair. *Deuster v. Mittag*, 105 Wis. 459 (81 N. W. Rep. 643). A landlord, under a lease expressly exempting him from any obligation to the tenant to make repairs or improvements upon or about the leased premises during the life of the lease, it not liable to the tenant for damages to his goods occasioned by the leased premises becoming and remaining out of repair. *Beneteau v. Stubler*, 79 Minn. 259 (82 N. W. Rep. 583). Cal. Civ. Code, §§ 1941, 1942 construed and applied—duty of lessors of premises to be occupied by human beings to keep the same in a habitable condition—right of lessee. *Cately v. Campbell*, 124 Cal. 520 (57 Pac. Rep. 567). S. Dak. Comp. Laws, §§ 3737, 3738 construed and applied—right of lessee to vacate the premises and discharge himself from further liability for rent, on account of the lessor's failure to repair the premises so as to make them habitable. *Prior v. Sanborn Co.*, 12 S. Dak. 86 (80 N. W. Rep. 169).

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## LEASES

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### WICKSON v. MONARCH CYCLE MFG. CO.

(128 Cal. 152.)

**Validity of parol lease to commence in the future.** Construing and applying Cal. Civ. Code, § 1624, providing: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: (1) An agreement that by its terms is not to be performed within a year from the making thereof. \* \* \* (5) An agreement for the leasing for a longer period than one year, or for the sale of real property, or for any interest therein," it is held that the two provisions must be construed together, and that a parol lease for a period of one year, to commence in the future is void.

COOPER. C.

**Sec. 427. Statement of the Case.** This is an appeal by plaintiff from a judgment in favor of defendant, and comes here on the judgment roll and a bill of exceptions. It appears from the evidence offered by plaintiff that on the 28th day of December, 1895, plaintiff and defendant entered into a parol

agreement, by the terms of which plaintiff agreed to let to defendant certain premises on Front street, in the city and county of San Francisco, for the term of one year from January 1, 1896, at the monthly rent of \$200 per month, and 10 per cent. on all retail sales to be made by defendant. Defendant entered under the lease, and paid the agreed rent for eight months of the term, when, without the consent of plaintiff, it vacated the premises, and refused to pay further rent. At the close of plaintiff's testimony, a nonsuit was granted on motion of defendant, and judgment entered accordingly. The main question in the case is as to the validity of the parol agreement for a one-year lease to commence in futuro. It is said by counsel that the question has never been decided in this state, and we are called upon to lay down the rule for the first time. The statute of 29 Charles II, ch. 3, which is the foundation of most of the provisions of the statutes of frauds of the several states, enacted that all leases, estates, or terms of years, or any uncertain interest in land, created by livery only, or by parol, and not reduced to writing and signed by the party making the same, or his agent, should have no other force or effect than a mere estate at will, excepting leases for a term not exceeding three years, whereupon the rent reserved shall amount to two-thirds of the full improved value of the premises. Section 1624, of the Civil Code of this state provides: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: (1) An agreement that by its terms is not to be performed within a year from the making thereof. \* \* \* (5) An agreement for the leasing for a longer period than one year, or for the sale of real property, or for any interest therein. \* \* \*" We think the agreement in this case void, under the express provisions of subdivision 1 of said section. The agreement was made December 28, 1895, and was not to be performed until January 1, 1897. This was more than one year "from the making thereof." It is true the time was only some three days more than a year after the contract was made, but we are not at liberty to extend it three days, nor any time beyond the year. If we could extend it three days, upon the same reasoning we could extend it three months or three years. It is said by Brown in his work on the Statute of Frauds. "It need only be added to what has been said that, if the time from the making of the agree-

ment to the end of its performance exceeds a year never so little, the statute applies; for, in the language of Lord Ellenborough, 'if we were to hold that a case which extended one minute beyond the time pointed out by the statute did not fall within its prohibition, I do not see where we should stop, for in point of reason an excess of twenty years will equally not be within the act.'" (Browne, Stat. Frauds, § 291). The contract could not possibly have been performed until one year from January 1, 1896, because the defendant had the full right under the contract, if valid, to the possession of the leased premises for all of the year 1896. Plaintiff could not have performed the contract until he had given defendant the possession for the full year.

**Sec. 428. Statute of frauds—Validity of parol lease to commence in the future—Authorities collated and reviewed.** It is argued by plaintiff that subdivision 5 of the section has the effect of making a lease for one year valid, no matter when it is to commence, and that said subdivision should govern, regardless of subdivision 1. If this be the true construction of the statute, the plaintiff, by parol, might have executed to defendant a valid lease of the premises for three years by three separate parol leases, one to commence January 1, 1896, one January 1, 1897, and one January 1, 1898. This reasoning would apply to any number of years, or to any number of leases made to different individuals, provided they did not conflict in point of time. The two subdivisions are to be read and construed together, and, as so read, a parol lease is valid for one year, but must be for no longer than one year from the time it is made. If it be such a lease as by its terms is to be performed within the year from the making thereof, it is valid. This is the construction of the English courts upon the original statute (29 Charles II.), in *Rawlins v. Turner*, 1 Ld. Raym. 736, where it is said: "It was ruled by Holt, C. J., at Lent assizes, at Kingston, 1699, that such lease for three years of land as will be good without deed within the 29 Charles II, ch. 3, § 2, must be for three years to be computed from the time of the agreement, and not for three years to be computed from any day after." *Hurley v. McDonnell*, 11 U. C. Q. B. 208; *Kaatz v. White*, 19 U. C. C. P. 36. The same construction has been followed in most of the states. *Tayl. Landl. & Ten.* (8th Ed.) § 30, and notes; *Wolf v. Dozer*, 22 Kan. 436;



Pulse v. Hamer, 8 Or. 251; White v. Holland, 17 Or. 4 (3 Pac. Rep. 573); Olt v. Lohnas, 19 Ill. 576; Comstock v. Ward, 22 Ill. 248; Cooney v. Murray, 45 Ill. App. 464; Delano v. Montague, 4 Cush, 44; Chapman v. Gray, 15 Mass. 443; Jellett v. Rhode, 43 Minn. 167 (45 N. W. Rep. 13; 7 L. R. A. 671); Johnson v. Albertson, 51 Minn. 335 (53 N. W. Rep. 642); Engler v. Schneider, 66 Minn. 388 (69 N. W. Rep. 139); Bain v. McDonald, 111 Ala. 272 (20 So. Rep. 77); Beiler v. Devoll, 40 Mo. App. 254; Cook v. Redman, 45 Mo. App. 397; Whiting v. Opera House Co., 88 Pa. St. 101; Birckhead v. Cummins, 33 N. J. L. 44, 51; Reed, Stat. Frauds, § 813. The author in the work last cited says: "The question always is whether the interval from the making of the agreement to the expiration of lease is or is not more than three years." The contrary doctrine has been held by the highest courts of some of the states, but upon examination it will be found that most of the decisions are upon statutes differing materially from ours. The case of Young v. Dake, 5 N. Y. 463 (55 Am. Dec. 356), is the leading case in favor of the contention claimed by plaintiff, and the case followed by the other New York decisions and in some of the decisions of other courts. In that case the court, after discussing sections 6 and 8 of the Revised Statutes of New York (2 Rev. Stat., p. 134), as the sections formerly existed, and as they existed at the time of the decision, held that the sections had been materially changed, and the words "from the making thereof" omitted. In the opinion it is said: "The term three years, as proposed, was reduced in the enactment to one year, and the words 'from the making thereof' entirely omitted." It was contended in that case that under 2 Rev. Stat., p. 135, § 2, subd. 1, the lease was void, because not to be performed within a year from the making thereof. But the court held that subdivision 1 of section 2 did not apply to a contract concerning lands. The language used is: "That provision of the statute is a part of title 2 of the statute to prevent frauds in conveyances and contracts; and the whole of that title and all its provisions has reference only to 'fraudulent conveyances and contracts relative to goods, chattels, and things in action.' It is very obvious that none of its provisions have any application to, or effect upon, contracts or agreements concerning lands or interest in lands. The first title performs that office; the second title applies to contracts and transactions affecting personal property only." It is thus evident that the New York cases

are not authority as to the construction of our statute. The case of *Huffman v. Starks*, 31 Ind. 475, follows the construction of the supreme court of New York in *Young v. Dake*, 5 N. Y. 463 (55 Am. Dec. 356); but under Rev. Stat. Ind. of 1852, ch. 42, which stated: "Fifth. That upon any agreement which is not to be performed within one year from the making thereof \* \* \* except under leases not exceeding the term of three years,"—it is obvious that leases are under the Indiana statute expressly excepted from the *infra annum* clause. The case of *Steininger v. Williams*, 63 Ga. 475, was under section 2280 of the Code of Georgia, which provides that, "contracts creating the relation of landlord and tenant for any term not exceeding one year may be by parol." It has been held in Colorado, Texas, Mississippi, and perhaps other states; that under statutes similar to ours a parol lease for the time named in the statute to commence in futuro is valid. But we think the decisions which so hold are contrary to the great weight of authority. The rule herein announced is, in our opinion, founded upon better reason, and is the correct interpretation of the two subdivisions of the section of Code. It is urged by plaintiff that the contract on the part of defendant was to be performed within a year from the making thereof,—that the rent was all to be paid according to the terms of the lease on December 1, 1896,—and that this takes the case out of the statute. There is a sharp conflict in the authorities as to whether or not a contract that is to be wholly performed on one side within the year is within the inhibition of the statute. The view we take of this case renders it unnecessary to decide the question. The agreement, as alleged in the complaint, and as proven, could not have been wholly performed by defendant within the year. The law imposes upon the defendant under the lease certain obligations. Among these obligations was that of using the premises in a reasonable and prudent manner, and not to commit waste thereon, not to attorn to a stranger, and to surrender up the premises at the end of the term in as good condition as they were at the time of defendant's entry, reasonable wear and tear thereof excepted. We advise that the judgment be affirmed. We concur: Britt, C.; Gray, C. (Per Curiam.) For the reasons given in the foregoing opinion the judgment is affirmed. Garoutte, J., VanDyke, J., Harrison, J. Hearing in Bank denied.

**Sec. 429. Validity of parol lease to commence in the future.**

Little can be added to the collection of authorities contained in the opinion reported in support of its holding; but the supreme court of Texas, in construing its statute which is identical with the California statute in all material particulars, holds that a lease for a term not longer than one year may be made to commence in the future, by verbal contract, and will be held to be binding. *Bateman v. Maddox*, 86 Tex. 546 (26 S. W. Rep. 51). Citing, *Sobey v. Brisbie*, 20 Ia. 105; *Anderson v. May*, 10 Heisk. 90; *Eaton v. Whitaker*, 18 Conn. 230; *Huffman v. Starks*, 31 Ind. 474; *Young v. Dake*, 5 N. Y. 463 (55 Am. Dec. 356); *Becar v. Flues*, 64 N. Y. 518; *Sears v. Smith*, 3 Colo. 287. The same is held in Michigan, *Whiting v. Ohlert*, 52 Mich. 462 (18 N. W. Rep. 219; 50 Am. Rep. 265); and in construing Sand. & H. Ark. Dig., § 3469, which provides that "no action shall be brought: \* \* \* Fifth. To charge any person upon any lease of lands \* \* \* for a longer term than one year. Sixth. To charge any person upon any contract, promise or agreement that is not to be performed within one year from the making thereof, unless \* \* \* in writing," etc., it is held by the supreme court of that state that the fifth subdivision applies to the lease of lands only, while the sixth applies to all other contracts, promises, agreements, etc., than those appertaining to lands. *Higgins v. Gager*, 65 Ark. 604 (47 S. W. Rep. 848). The court say: "It will be observed that the words 'from the making thereof' are not used in the fifth subdivision. They were doubtless omitted for the very purpose of excepting from the purview of the statute verbal contracts to lease lands for one year or less, thus leaving such contracts valid, as they were at the common law, and thereby having the law to conform to what was the custom of the people of this state, as to such contracts. At any rate, 'Ita lex scripta est.' The language of this (fifth) subdivision clearly has reference to the duration of the term from the time the tenant is to commence to occupy the premises, and not from the time the contract is made. There is not a word in the statute to warrant the conclusion that the time between the making of the lease and its commencement in possession is to be taken as a part of the term granted by the lease. Life is too short and time is too precious to review the many conflicting authorities, and to expatiate upon the vast and varied learning in the books, upon this subject. The view we have expressed is supported by the better reason and the highest courts of several states. *McCroy v. Toney*, 66 Miss. 233 (5 So. Rep. 392; 2 L. R. A. 847); *Steininger v. Williams*, 63 Ga. 475; *Young v. Dake*, 5 N. Y. 463 (55 Am. Dec. 356); *Becar v. Flues*, 64 N. Y. 518; *Sobey v. Brisbie*, 20 Ia. 105; *Jones v. Marcy*, 49 Ia. 188; 2 Reed, St. Frauds, § 813 et seq., where the question is discussed and authorities pro and con cited."

A parol agreement for a lease to commence in the future with a person already in possession of the premises as a tenant, is within the statute of frauds. *Gladwell v. Holcomb*, 60 O. St. 427 (54 N. E. Rep. 473; 71 Am. St. Rep. 724). Although a parol agreement of lease for a term of years to commence in the future is void under the statute of frauds of Alabama, yet such a contract followed by use and occupation creates the relation of landlord and tenant. *Howard v. Jones*, 123 Ala. 448 (26 So. Rep. 129).

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### EPITOME OF CASES.

**Sec. 430. What constitutes a valid lease.** A lease by a railroad company of a portion of its right of way to a manufacturing company, with a view of securing freight therefrom, is valid. *Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416 (79 N. W. 635). Mere occupancy of premises for a short time by a prospective lessee who has received a proposition as to their leasing for the period of one year, without any written instrument being signed or any definite agreement being reached between the parties, does not establish a contract to lease the premises for one year. *Gramm v. Sterling*, 8 Wyo. 527 (59 Pac. Rep. 156). Where the lands to be embraced in a lease have been rendered certain by the lessor immediately upon the execution thereof, designating to the agent of the lessee the lands reserved by a stipulation in the lease, it will not be held insufficient on the ground of uncertainty of the description. *Indianapolis Nat. Gas Co. v. Pierce*, 25 Ind. App. 116 (56 N. E. Rep. 137). A lessor who leases his property with knowledge that the lessee intends to use it for an illegal or an immoral purpose cannot recover rent therefor. *Mound v. Barker*, 71 Vt. 253 (44 Atl. Rep. 346; 80 Am. St. Rep. 767). Citing, *Sherman v. Wilder*, 106 Mass. 537; *Riley v. Jordan*, 122 Mass. 231; *Ernst v. Crosby*, 140 N. Y. 364 (35 N. E. Rep. 603); 2 Tayl. Landl. & Ten. (8th Ed.) § 521; *Jennings v. Throgmorton*, Ryan & M. 251 (21 E. C. L. 744); *Smith v. White*, L. R. 1 Eq. 626. Particular contract between railway corporations held to be a lease and not a partnership. *South Carolina & G. R. Co. v. Augusta Southern R. Co.*, 107 Ga. 164 (33 S. E. Rep. 36).

**Sec. 431. Construction of leases.** A stipulation in a lease of property for one year that the lessee may keep it at

the same price per year "for as many as five consecutive years," if he so desire, becomes binding upon the parties, upon the lessee electing within the first year to avail himself of such privilege and so notifying his lessor. *Connor v. Withers*, Ky.

(49 S. W. Rep. 309; 20 Ky. Law Rep. 1326). Where the rental (\$641.83) stipulated in a lease beginning "on the twentieth day of October, 1897" and ending "on the twentieth day of October, 1898," is made payable in installments of "58.33 on the 20th day of each and every month" and there is no express stipulation that the monthly installments of rent are to be payable in advance, they become due on the 20th calendar day at the end of each month of the tenancy. *Castleman v. Du Val*, 89 Md. 657 (43 Atl. Rep. 821). A stipulation in a written contract of lease that the lessee should have the privilege of erecting houses on the premises, "to be removed by [him] at the expiration of his lease, or sold to the [lessors] at 8 per cent. less than the cost of the buildings," simply gives the lessor an option to purchase the buildings, and does not create a binding obligation on his part to purchase the same. *Anderson v. Swift*, 106 Ga. 748 (32 S. E. Rep. 542). Construing a stipulation in a lease that at the end of the term the lessors would pay for improvements made by the lessee unless they should give notice of renewal, it is held that a notice by them that they elected to take possession "pursuant to the provisions of the lease" without stating that they would pay for the improvements, is sufficient; nor is such payment a condition precedent to their right to have possession. *In re Coatsworth*, 160 N. Y. 114 (54 N. E. Rep. 665). A stipulation in a lease by the owner of a strip of land upon which is located a narrow gauge railroad for hauling coal mined on his land, executed for the purpose of enabling the lessee to construct a standard gauge railroad on such land, providing that "the said lessee shall not obstruct or interfere with the free use and operation of the present coal railroad now located and in use on said strip of land," does not authorize the lessor to build a standard gauge railroad on such strip. *Phillips v. Pittsburg, V. & C. Ry. Co.*, 189 Pa. St. 309 (42 Atl. Rep. 194). For construction of particular lease of water power, see *Bangs v. Waterville & F. Ry. & Light Co.*, 92 Me. 559 (43 Atl. Rep. 507). For construction of particular leases, see *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185 (44 Atl. Rep. 612); *Dubuque Lumber Co. v. Kimball*, 111 Ia. 48 (82 N. W. Rep. 458).

**Sec. 432. Covenants in leases.** A lessee who in a lease assumes the payment of taxes subsequently levied upon the premises does not obligate himself thereby to pay any taxes which may be illegal or void. *Scott v. Society of Russian Israelites*, Neb. (81 N. W. Rep. 624). Where the due payment of taxes is one of the covenants of a lease, and the taxes are allowed to become delinquent by the lessee or his assigns, no demand for their payment by the lessor is necessary, before declaring a forfeiture. *Bacon v. Park*, 19 Utah, 246 (57 Pac. Rep. 28). A covenant in a lease that, if liquor shall be sold on the demised premises, the business shall be conducted strictly according to law, is a covenant running with the land; and a breach of this covenant by a subtenant of an assignee of the lease is, as between the assignee and the original lessor, a breach by the assignee. *Crowe v. Riley*, 63 O. St. 1 (57 N. E. Rep. 956). Construing and applying N. Dak. Rev. Codes, §§ 3366, 3367, it is held that a covenant by one leasing from a railroad company a part of its right of way, that he will save and hold the lessor harmless from losses arising out of the destruction of property on the leased premises by fire set by the lessor's engines, passes to the assignee of the lessor. *Northern Pac. Ry. Co. v. McClure*, 9 N. Dak. 73 (81 N. W. Rep. 52; 47 L. R. A. 149).

**Sec. 433. Covenant for quiet enjoyment.** A covenant of quiet enjoyment in a lease by the owner of land having the right to water from a ditch for irrigation is not broken so as to relieve the lessee from liability for rent, by the lessor's failure to deliver the water, there being no agreement on his part to do so and no failure in his title to the water right or to defend the lessee therein. *Stephens v. Wadleigh*, Ariz. (57 Pac. Rep. 622). An implied covenant for quiet enjoyment does not arise from the mere relation of landlord and tenant, even if such relation be created by lease under seal, nor will the mere use of the words, "to let" or "to lease" in a written agreement of letting or leasing give rise to an implied covenant for quiet enjoyment, or other covenants for title; but in order to give rise to such a covenant or covenants, the words "demise," "grant" or other words of like import, must be used and contained in the lease. *Mershon v. Williams*, 63 N. J. L. 398 (44 Atl. Rep. 211). See opinion for exhaustive discussion of, and collation of ancient authorities on this subject.

**Sec. 434. Breach of covenant in lease—Measure of damages.** The measure of damages for a breach of the lessee's covenant to leave the premises in repair is the cost necessarily incurred in putting the premises in the state of repair required by the lease. *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185 (44 Atl. Rep. 612). Damages for a breach of a lessor's covenant to give possession are limited to the difference between the actual rental value of the premises for the term and the rent reserved in the lease, where no special damages are alleged. A lessee who has been deprived of performing his contract of employment with a third party on account of a breach of his lessor's covenant to give him possession, cannot recover prospective loss of wages or profits arising from such a contract, it not appearing that the lessor had any knowledge of the lessee's business or of the contract of hiring when the lease was made. *Serfling v. Andrews*, 106 Wis. 78 (81 N. W. Rep. 991).

**Sec. 435. Renewal of lease.** Where a lease of lands is made for a term of one year "with the privilege of four more years" from the expiration of the first year, the lessee has the option to extend the term for the additional period. Such election may be made by the tenant or one occupying the premises with his consent or in his stead, in lieu of other notice to the landowner, by holding over at the end of the first year and paying rent; and, when so exercised, such election will entitle and bind the lessee for the whole of such additional term; but a notice on behalf of the lessee at the expiration of the first year that the occupant will remain for another year does not operate to extend the lease. *Mershon v. Williams*, 62 N. J. L. 779 (42 Atl. Rep. 778). Equity will not relieve a lessee from the consequences of his negligently failing to give notice according to the terms of the lease, of his intention to avail himself of an option given by it to extend the lease on giving notice in writing twenty days previous to its expiration. *Dikeman v. Sunday Creek Coal Co.*, 184 Ill. 546 (56 N. E. Rep. 864). For construction of particular covenant as to extension of lease, see *Willoughby v. Atkinson Furnishing Co.*, 93 Me. 185 (44 Atl. Rep. 612). Particular evidence held insufficient to establish an oral agreement to extend a lease. *Lutz v. Wainwright*, 193 Pa. St. 541 (44 Atl. Rep. 565).

**Sec. 436. Assignment of lease.** The rights of a lessee under a written lease are assignable. *Connor v. Withers*, Ky. (49 S. W. Rep. 309; 20 Ky. Law Rep. 1326). A lease to one, his heirs, executors and administrators, is assignable where it contains no restriction against assignment. *Crowe v. Riley*, 63 O. St. 1 (57 N. E. Rep. 956). An assignee of a lease, the recitals in which refer to a prior lease, takes with notice of such prior lease. *Aye v. Philadelphia Co.*, 193 Pa. St. 451 (44 Atl. Rep. 555; 74 Am. St. Rep. 697). The mere acceptance of rent by the lessor after the assignment of the lease does not release the lessee from his covenant to pay rent. *Adams v. Burke*, 21 R. I. 126 (42 Atl. Rep. 515). An assignment after the expiration of the term by the lessor of all his interest, right and title in his lease, passes to his assignee the right to recover accrued rents and damages due for a breach of the lease. *Indianapolis Nat. Gas Co. v. Pierce*, 25 Ind. App. 116 (56 N. E. Rep. 137). A stipulation in a deed of a part of a leasehold estate by an assignee of the original lessee that "the said grantee agrees to pay the rent on said premises that may annually become due to [the original lessor] as a part of the consideration of this deed," binds the grantee to pay the full amount due to the original lessor under the original lease, where express reference is made to such lease and the assignment thereof in the deed. *Woodruff v. Baldwin*, 72 Conn. 439 (44 Atl. Rep. 748). For construction of particular assignment of a lease, see *Lewis v. Richardson*, 2 Ind. Ter. 341 (51 S. W. Rep. 969).

**Sec. 437. Liability of assignee or receiver of lessee—Surrender of lease.** A receiver of an insolvent lessee, who, upon demand being made upon him either to pay the rent reserved in the lease or surrender the premises, repudiates all liability under the lease except for the time that the premises were occupied by him, is liable only for a reasonable rent during his occupancy. *Commercial Bank v. Gates*, 121 Mich. 281 (80 N. W. Rep. 13). A monthly installment of rent which, under the terms of the lease, is payable in advance on the first day of the month is the debt of the lessee as between him and his assignee for the benefit of creditors to whom he made an assignment on the second day of the month without paying the rent, although the assignee succeeded to the possession of the property at the time of the assignment; and no liability for rent



accrues against such an assignee where his possession terminated before the expiration of the month. *Walton v. Stafford*, 162 N. Y. 558 (57 N. E. Rep. 92). An assignee or receiver of an insolvent corporation may surrender a lease held by it to its lessor and thus terminate the liability thereunder for rent, where, in his judgment, such lease is disadvantageous property and a burden to the estate. *New Hampshire Trust Co. v. Taggart*, 68 N. H. 557 (44 Atl. Rep. 751). The court say: "In Massachusetts it is held that an assignee is not chargeable for rent unless he accepts the lease. 'Although by operation of law the right or title to demised premises under a lease passes to the assignee of an insolvent debtor, yet he is not chargeable for rent unless he actually enters upon and enjoys the estate, or does some other act indicating an acceptance of the lease.

\* \* \* An assignee therefore, is not bound to accept a lease which, in consequence of the amount or rent reserved in the covenants to be kept by the lessee, would prove a burden on the estate in his hands, and diminish the assets to be distributed among the creditors.' *Hoyt v. Stoddard*, 2 Allen, 442. 'It seems to us that, if a receiver of an insolvent corporation takes possession of its leasehold estate, he is liable only for a reasonable rent during the time that he retains possession; that he does not become an assignee of the term, and is not liable on the covenants of the lease. As the receiver paid rent to the satisfaction of the lessor while in possession we are of the opinion that he not liable for any further rent.' *Bell v. League*, 163 Mass. 558, 563 (40 N. E. Rep. 857; 28 L. R. A. 452; 47 Am. St. Rep. 481). A similar view is expressed in *Com. v. Franklin Ins. Co.*, 115 Mass. 278. In *United States Trust Co. v. Wabash Western Ry. Co.*, 150 U. S. 287, 299 (14 Sup. Ct. Rep. 86; 37 L. Ed. 1085), the law is thus stated: 'The general rule applicable to this class of cases is undisputed, that an assignee or receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the shoes, of his assignor, if, in his opinion, it would be unprofitable or undesirable to do so; and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts. If he elects to adopt the lease, the receiver becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver, by which the latter becomes liable upon the covenant to pay rent.' The same rule is laid down in *Woodruff v. Railway Co.*, 93 N. Y. 609; *Gaither v. Stock-*

bridge, 67 Md. 222 (9 Atl. Rep. 632; 10 Atl. Rep. 309); Oil Co. v. Wilson, 142 U. S. 313 (12 Sup. Ct. Rep. 235; 35 L. Ed. 1025); Railroad Co. v. Humphreys, 145 U. S. 82 (12 Sup. Ct. Rep. 787; 36 L. Ed. 632)."

**Sec. 438. Destruction of premises—Relief to tenant upon their becoming uninhabitable.** Construing and applying Ga. Civ. Code, § 3135, providing that "the destruction of a tenement by fire, or the loss of possession by any casualty, not caused by the landlord, or from defect of his title, shall not abate the rent contracted to be paid," it is held that where farming lands were rented for a term of years, and the tenants agreed "to keep up all repairs at their own expenses, fire and providential causes excepted," the whole rent could be recovered, notwithstanding the total destruction, by accidental fire, of a gin house situated on the rented premises. *Mayer v. Morehead*, 106 Ga. 403 (32 S. E. Rep. 349). A lessee of a room in a building and the land in the rear thereof cannot recover advance payments of rent on account of the room being untenable as the result of a partial destruction by fire, where it appears that there was no such destruction of the room as deprived him of the right of occupancy for the purpose of repairing the same so as to make it tenantable, and no offer on his part to surrender the premises. *Leiberthal v. Montgomery*, 121 Mich. 369 (80 N. W. Rep. 115). N. Y. Laws 1860, ch. 345, relieving a tenant from liability for rent after the building has become untenable from any cause not his fault, does not apply to a case where the defect existed when the lease was made, and no fault or misrepresentation is shown on the part of the landlord, or when it results from the neglect of the tenant to make ordinary repairs or from the deterioration from ordinary use by the tenant. *Meserole v. Hoyt*, 161 N. Y. 59 (55 N. E. Rep. 274). For further construction of this statute see *Ballards' Law of Real Property*, Vol. VII, § 438.

**Sec. 439. Liability of lessee for destruction or injury to the property through his negligence—Lease by county.** A county which, lacking a court house, rents a building from a private individual for county purposes, impliedly obligates itself to the lessor for carefulness and prudence in the use of it, and may enter into a written agreement of lease containing the ordinary covenants against waste, etc.; and if, through the

negligence of the officers charged with the duty of caring for the premises, the building is destroyed by fire, the county is responsible in damages for its value. *Williams v. Board of Com'rs*, 61 Kan. 708 (60 Pac. Rep. 1046). The court say: "The defendant in error urges that the claim of liability against it must rest upon the covenants against waste, etc., contained in the lease, and that the statutory permission to provide suitable rooms for county purposes does not authorize the making of such covenants. In our judgment, this contention is without force. Authority to contract with private persons for buildings for county purposes is an authority to enter into the ordinary agreements of lease. It is an authority to stipulate upon the same terms that private individuals ordinarily stipulate for the occupancy of leased premises. But over and beyond this contention, and independently of any of the special covenants of the lease, the relation of landlord and tenant beget the obligation to care for the leased premises with ordinary prudence and carefulness, and beget the obligation to respond in damages for negligent destruction. In *United States v. Bostwick*, 94 U. S. 53 (24 L. Ed. 65), a formal lease of certain premises to the United States was not executed, but was held that certain correspondence between the lessor and the authorized government officials constituted a contract of rental for a year with the privilege of a renewal for three additional years, and the ordinary liability of a tenant to respond for negligence in the use of the premises existed upon the part of the United States. The court, in its opinion, remarked: 'This being the case, the contract is one by which Mr. Lovett agreed to let, and the United States to hire, the premises described for the term of one year, with the privilege of three, at a rent of \$500 a month, and without restriction as to the use to which the property might be put. The United States agree to nothing in express terms except to pay rent and hold for one year. But in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee so to use the property as not unnecessarily to injure it, or, as it is stated by Mr. Comyn, "to treat the premises demised in such a manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or negligent conduct of the lessee." *Com. Landl. & Ten.* 188. This implied obligation is part of the contract itself, as much so as if incorporated into it by ex-

press language. It results from the relation of landlord and tenant between the parties which the contract creates. *Holford v. Dunnett*, 7 Mees. & W. 352. It is not a covenant to repair generally, but to so use the property as to avoid the necessity for repairs as far as possible. *Horsefall v. Mather*, Holt, 9; *Brown v. Crump*, 1 Marsh. 569. There are in this contract no stipulations to take the place of, or in any manner restrict, this implied obligation on the part of the United States growing out of their relation to the petitioner as his lessees. They had the free and unrestricted right to use the property for any and all purposes, but were bound to so conduct themselves in such use as not to cause unnecessary injury. Whatever damages would necessarily result from the use for the same purpose by a good tenant must fall upon the lessor. All that the relation of landlord and tenant implies in this particular is that the tenant, while using the property, will exercise reasonable care to prevent damage to the inheritance. His obligation rests upon the maxim, "*Sic utere tuo ut alienum non laedas.*" If he fails in this, he violates his contract, and must respond accordingly."

**Sec. 440. Miscellaneous notes.** A tenant, who, at the end of a given year without giving any notice to his landlord of his intention to terminate the tenancy, abandons the premises, but leaves them in possession of another who previously had been his subtenant, is liable for the rent to the landlord accruing on account of the subsequent occupancy of the subtenant. *Roberson v. Simons*, 109 Ga. 360 (34 S. E. Rep. 604). An agreement by a lessee in possession of premises, with a third person that if the latter will purchase the premises he will continue his occupancy for a certain length of time, use the premises in a certain manner and make certain purchases from such party, on such purchase of the premises being made, becomes substituted for the original lease, and the purchaser's remedy is on the contract in case of the lessee's vacation of the premises. *Sioux City Stockyards Co. v. Sioux City Packing Co.*, 110 Ia. 396 (81 N. W. Rep. 712).

# LICENSE

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## EPITOME OF CASES.

**Sec. 441. Assignment and revocation of license.** A parol license to cut timber on the licensor's land is not assignable, and is revoked if the licensor deed the land to another or if either party die. *Bruley v. Garvin*, 105 Wis. 625 (81 N. W. Rep. 1038; 48 L. R. A. 839). In Oregon it is held that a parol license cannot be revoked after the licensee has expended money or performed labor in making valuable and permanent improvements upon real property upon the faith of such license. *Bowman v. Bowman*, 35 Or. 279 (57 Pac. Rep. 546); *Hallock v. Sutor*, 37 Or. 9 (60 Pac. Rep. 384). But in order for this rule to apply the license must result from some consideration paid by the licensee or some benefit accruing to the licensor, and not rest merely upon the acquiescence of the latter. *Lavery v. Arnold*, 36 Or. 84 (57 Pac. Rep. 906). For exhaustive note on "Revocability of license to maintain a burden on land, after the licensee has incurred expenses in creating the burden," see 49 L. R. A. 497-526. Where an owner of land by a written instrument under seal conveys to another the privilege of building a storehouse on the land, and agrees in such instrument that the grantee shall have "the use of the said property, free of rent, so long as he desires to use it," and that, when such grantee and his successors fail to use it as a business house, then the grantee shall have the privilege of selling the house or removing it, and where the grantee, upon the faith of such conveyance, incurs expense in erecting such a house upon a lot designated by the owner for the purposes contemplated by the parties, the grantee thereby acquires an easement and such interest in the property conveyed as is assignable by him, and cannot be revoked by the grantor. *Ainslie v. Easton*, 107 Ga. 747 (33 S. E. Rep. 711).

**Sec. 442. Miscellaneous notes.** Particular grant of wharf privileges held to be a license and not an easement. *Mc-*

Clellan v. Taylor, 54 S. C. 430 (32 S. E. Rep. 527). A provision in a city ordinance regulating the use of its streets by hackmen, granting exclusive privilege in respect to solicitation of passengers, is invalid. Pennsylvania Co. v. City of Chicago, 181 Ill. 289 (54 N. E. Rep. 825).

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## LIENS

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### EPITOME OF CASES.

**Sec. 443. Judgment lien—Estate to which it attaches.**

A judgment lien does not attach to land held by a debtor under an executory contract of purchase which is set aside because of the fraud of his vendor or on account of his default in making payments. *Nelson v. Turner*, 97 Va. 54 (33 S. E. Rep. 390). Real property purchased by the judgment debtor subsequent to the rendition of a judgment against him is subject to the lien of such judgment as soon as the title vests in the debtor, and the lien may be enforced against the land, together with improvements afterward placed thereon, either in his hands or in the hands of a subsequent purchaser. *Lassert v. Sieberling*, 59 Neb. 309 (80 N. W. Rep. 900). The lien of a judgment does not attach to land conveyed by the debtor by an unrecorded deed executed in good faith before the rendition of the judgment. *Lytle v. Black*, 107 Ga. 386 (33 S. E. Rep. 414). A judgment is not a lien on lands which the judgment debtor has previously conveyed, though with intent to defraud creditors, under *Sand. & H. Ark. Dig.*, § 4204, which provides that judgments shall be liens on lands of the judgment debtors, and § 3049, providing for the sale on execution of lands of which the judgment debtor, or any person for his use, is seized in law or equity. *Doster v. Manistee Nat. Bank*, 67 Ark. 325 (55 S. W. Rep. 137; 77 Am. St. Rep. 116; 48 L. R. A. 334). In Kentucky it is held that mere allowance of alimony to a wife in a judgment of divorce obtained by her which con-

tains no provision making the allowance a lien on the estate of her husband, creates only a personal liability, and the wife has no lien on any part of his estate. *Campbell v. Trosper*, Ky. (57 S. W. Rep. 245). In Minnesota the lien of a judgment obtained by a husband's creditor is an absolute lien on two-thirds of the husband's land and a contingent lien on the other one-third, dependent upon his surviving his wife; and upon his death before that of his wife the lien of the judgment on the one-third ceases, and is not revived against it on account of the failure of the widow to elect, under Gen. Stat. 1894, § 4472, and renounce the provision made for her in the will of her deceased husband, and take under the statute. *New Hampshire Sav. Bank v. Barrows*, 77 Minn. 138 (79 N. W. Rep. 660). By § 524 of the Nebraska Criminal Code, a judgment of the district court in favor of the state for costs is a lien on all real estate in the county owned by the accused at the time of docketing the cause. *Predohl v. O'Sullivan*, 59 Neb. 311 (80 N. W. Rep. 903). Shannon's Tenn. Code, §§ 4712, 4713, 4732-4734 construed and applied—lien of judgment against equitable interest in real estate—bill to enforce. *Weaver v. Smith*, 102 Tenn. 47 (50 S. W. Rep. 771).

**Sec. 444. Judgment lien—When it attaches—Docketing and recording.** The registry of a judgment in the probate judge's office, under Ala. Code 1896, §§ 1920-1923, creates no lien unless the name of the owner of the judgment is shown therein. *Duncan v. Ashcraft*, 121 Ala. 552 (25 So. Rep. 735); *Appling v. Stovall*, 123 Ala. 398 (26 So. Rep. 212); *Ivy Coal & Coke Co. v. Alabama Nat. Bank*, 123 Ala. 477 (26 So. Rep. 213). Ill. Crim. Code, div. 14, § 15, construed and applied—as to when lien for fine and costs adjudged in a criminal prosecution attaches. *Schwartz v. Ritter*, 186 Ill. 209 (57 N. E. Rep. 887). Under Kan. Gen. Stat. 1897, ch. 95, §§ 440, 444, before a judgment rendered in one county can operate as a lien on real estate of a judgment debtor in another, a certified transcript must be filed in the office of the clerk of the district court of the latter county; and this rule applies to a judgment rendered by a justice of the peace, and the statute is not complied with by the filing of a certified abstract of such judgment. *Hubbard v. Jones*, 61 Kan. 722 (60 Pac. Rep. 743). Mo.

Rev. Stat. 1889, §§ 6012, 6286, 6287 construed and applied—judgments of circuit court and justices of the peace—when lien attaches and priority. *Bradley v. Heffernan*, 156 Mo. 653 (57 S. W. Rep. 763); *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565 (57 S. W. Rep. 1095). Okla. Stat., §§ 4634, 4635; pp. 861, 1190, 1191 construed and applied—recording judgment of probate court in district court—lien and execution. *Lowenstein v. Young*, 8 Okla. 216 (57 Pac. Rep. 164). Hill's Ann. Or. Laws, §§ 269, 572 construed and applied—docketing judgment—filing transcript of in another county. *Hutchinson v. Gorham*, 37 Or. 347 (61 Pac. Rep. 431). A judgment recorded and indexed, as required by Tex. Rev. Stat., §§ 3287-3289, becomes a lien from the date of its recording, although the officer fails to note the day and hour of recording on such record, as required by § 3287. *Vidor v. Rawlins*, 93 Tex. 259 (54 S. W. Rep. 1026). Wis. Rev. Stat., §§ 2900, 2902, 3669 construed and applied—filing transcript of judgment of justice of the peace. *Duecker v. Goeres*, 104 Wis. 29 (80 N. W. Rep. 91).

**Sec. 445. Judgment lien—Federal judgments.** Ia. Laws 1878, ch. 129, § 2, amending Code 1873, § 2885, so as to require the filing of judgments of federal courts in the county in which the land is situated, in order to make them liens thereon, was ineffectual when passed; but it became effectual without re-enactment, upon the passage of Act Cong. 1888, ch. 79, providing "that judgments and decrees rendered in any circuit or district court of the United States within any state, shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state." *Blair v. Ostrander*, 109 Ia. 204 (80 N. W. Rep. 330; 47 L. R. A. 469; 77 Am. St. Rep. 532).

**Sec. 446. Judgment liens—Priority of liens.** One who takes a conveyance of land from a judgment debtor takes it subject to the lien of the judgment. *First Nat. Bank v. Hays*, Ida. (61 Pac. Rep. 287). There is no priority of lien between existing judgments duly entered against a judgment debtor, although of different dates, as to property subsequently acquired by him. *Belknap v. Greene*, 56 S. C.



119 (34 S. E. Rep. 26). Citing, *Relf v. McComb*, 2 Head, 558 (75 Am. Dec. 748); *Cayce v. Stovall*, 50 Miss. 396. Where judgments are not liens on after-acquired lands, the execution first levied will prevail. *Sherrard's Ex'rs v. Johnson*, 193 Pa. St. 166 (44 Atl. Rep. 252; 74 Am. St. Rep. 680). The lien of an existing judgment attaches to real estate purchased by the judgment debtor and has priority over a mortgage thereon executed by him at the time he receives his deed for the land to another person to secure a debt other than for the purchase money. *Weil v. Casey*, 125 N. C. 356 (34 S. E. Rep. 506; 74 Am. St. Rep. 644). Where, after judgment and levy on lands, the judgment debtor executes a mortgage, and the judgment becomes dormant, the revival of the judgment does not operate to the prejudice of the mortgage lien; but in such case the mortgage lien becomes perfect, and the judgment lien on the mortgaged premises is lost. *Smith v. Schwartz*, 21 Utah, 126 (60 Pac. Rep. 305). Citing, *Tracy v. Tracy*, 5 McLean, 456 (Fed. Cas. No. 14128); *Norton v. Beaver*, 5 Ohio, 178; *Miner v. Wallace*, 10 Ohio, 404; *Deneigre v. Haun*, 13 Ia. 240, 244; 1 Freem. Ex'ns, § 205, and note 1; 1 Freem. Judgm., §§ 383, 388, 394. Ia. Code 1873, § 1309 construed and applied—priority of lien of judgment against railroad company for personal injury. *Winter v. Iowa Cent. Ry. Co.*, 111 Ia. 342 (82 N. W. Rep. 760). Construing and applying Ohio Rev. Stat., §§ 5380, 6165, it is held that where a judgment is a subsisting lien on the lands of the debtor at the time of his death, it is not necessary thereafter to issue execution upon it in order to preserve the lien; it is entitled to share in the proceeds of the land, when sold by the personal representative, according to its priority at the time of the debtor's death, although execution be not issued thereon within five years from its rendition or the date of the last execution. *Ambrose v. Byrne*, 61 O. St. 146 (55 N. E. Rep. 408).

**Sec. 447. Judgment liens—Miscellaneous notes.** A decree for alimony is a lien upon real estate, the same as a judgment at law, and is enforceable in like manner. *Dufrene v. Johnson*, 60 Neb. 18 (82 N. W. Rep. 107). The right of the holder of a judgment to the lien given him by the statute cannot be impaired by subsequent legislation. *Merchants' Bank v. Ballou*, 98 Va. 112 (32 S. E. Rep. 481; 44 L. R. A. 306). The

holder of a judgment lien which is a first lien cannot release the land of his debtor, taken in execution on a junior judgment, so as to preserve his lien for the full amount against other land of the debtor, against the latter's will. *Fisler v. Stewart*, 191 Pa. St. 323 (43 Atl. Rep. 396; 71 Am. St. Rep. 769). An agreement by one having a lien on premises to secure the payment of a debt, to receive the rents of the premises in liquidation of his claim instead of enforcing it by a sale thereof, binds him from enforcing the lien only for a reasonable length of time. *Anderson v. Wainwright*, 67 Ark. 62 (53 S. W. Rep. 566). The statute of limitations begins to run against the assignee of a judgment in favor of the state from the time of the assignment, and such a judgment becomes dormant at the end of five years from that time. *Pre-dohl v. O'Sullivan*, 59 Neb. 311 (80 N. W. Rep. 903). The levy of an execution upon real estate during the time the judgment upon which the execution issued was a lien upon the same, neither extends the lien of the judgment, nor does it create a new lien upon the property. *Smith v. Schwartz*, 21 Utah, 126 (60 Pac. Rep. 305). Citing, *Bagly v. Wood*, 37 Cal. 121; *Sanders v. Russell*, 86 Cal. 119 (24 Pac. Rep. 852; 21 Am. St. Rep. 26); *Eby v. Foster*, 61 Cal. 287; *Tenney v. Hemmenway*, 53 Ill. 98; *Gridley v. Watson*, 53 Ill. 186; *Conwell v. Watkins*, 71 Ill. 488; *Pierce v. Fuller*, 36 Hun, 179; *Roe v. Swart*, 5 Cow. 294; *Tuft's Adm'r v. Tufts*, 8 Wend. 621; 1 Freem. Judgm., § 383; 1 Freem. Ex'ns, § 205, and note; *Davis v. Ehrman*, 20 Pa. St. 258. Ga. Civ. Code, § 2779 construed and applied—effect upon lien of judgment, of failure to record fieri facias. *Harvey v. Sanders*, 107 Ga. 740 (33 S. E. Rep. 713). Shannon's Tenn. Code, § 4719, providing that the satisfaction of a judgment may be set aside if no title is obtained to the property sold to satisfy the judgment, does not entitle a judgment creditor who has bid his judgments on land, and thus satisfied them, to have this satisfaction vacated, and the judgments reinstated because he obtained only a life estate in the land, when he believed he was getting a fee simple estate and bought under that belief; nor is a judgment creditor entitled to such relief where he refuses to account for what he has received from the purchase. *Gonce v. McCoy*, 101 Tenn. 587 (49 S. W. Rep. 754; 70 Am. St. Rep. 714). Tex. Rev. Stat. 1879, § 3160; Rev. Stat., §

3361 construed and applied—duration of judgment lien—revival of judgment. *Wilcox v. First Nat. Bank*, 93 Tex. 322 (55 S. W. Rep. 317).

**Sec. 448. Equitable liens.** One who performs services under a contract with another that the latter will devise him all his property, may have a lien for the value of his services upon the real estate agreed to be given or devised to him upon the failure of the owner thereof to keep his agreement. *Thomas v. Feese*, Ky. (51 S. W. Rep. 150; 21 Ky. Law Rep. 206). As between lien holders having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity; but if one, on other grounds, has a better equity than the other, time is immaterial. So if one has, in addition, the legal estate, or the right to use the legal title in support of his security, his lien will be given preference, and will not be in any way prejudiced by a lien based wholly on equitable grounds, even though the latter be first in time. *Campbell v. Sidwell*, 61 O. St. 179 (55 N. E. Rep. 609).

**Sec. 449. Legacies as charge on lands.** Where a testator has no personal property at the time he executes a will and bequeaths specific legacies, a presumption will arise that he intended to charge them upon his lands. *Clotilde v. Lutz*, 157 Mo. 439 (57 S. W. Rep. 1018; 50 L. R. A. 847). The payment of an annual sum which a deceased, by an antenuptial contract with his widow, has provided shall be made to her is a charge first upon his personal estate rather than his devised real estate, although it results in a material diminution of legacies provided for by his will. *Pitkin v. Peet*, 108 Ia. 480 (79 N. W. Rep. 272). Legacies expressly charged on land "until paid" remain a lien thereon until actual payment, regardless of the statute of limitations and presumption of payment. *In re Wolfer's Estate*, Pa. St. (43 Atl. Rep. 392). Though legacies do not stand upon as high ground as debts, yet, if the personal fund be inadequate, or if there are expressions in the will tending to show that the testator had the land in his mind for their payment, they are a charge on the land devised. *Hogg v. Browning*, 47 W. Va. 22 (34 S. E. Rep. 754). Where legacies are charged upon two parcels of land devised by a testator to different persons,

they will be enforced equally against each of the parcels of real estate. *Cunningham v. Cunningham*, 72 Conn. 253 (43 Atl. Rep. 1046). Where a residuary clause in a will blends the real and personal estates into one mass, the legacies are charged not only upon the personal, but also on the real, estate. *Carter v. Gray*, 58 N. J. Eq. 411 (43 Atl. Rep. 711). Where legacies are made a specific charge upon a bequest of personalty, their payment cannot be enforced against lands devised by the same will; and this rule applies although the personal property has been applied in exoneration of the land from a mortgage debt or a vendor's lien created by the testator. *Todd v. McFall*, 96 Va. 754 (32 S. E. Rep. 472). A legacy which a testator directs his devisee of land to pay out of certain moneys of the testator deposited in the devisee's name, does not become a charge on the land by the testator using such deposited funds before his death. *Crawford v. McCarthy*, 159 N. Y. 514 (54 N. E. Rep. 277). The lien of a legatee whose legacy is made a charge on land is not affected by a foreclosure sale of the land, had under a mortgage executed by the devisee thereof, the legatee being a party neither to the mortgage nor the foreclosure. *Shriver v. Clau-son*, 89 Md. 753 (43 Atl. Rep. 925). For construction of particular wills held to charge the testator's real estate with the payment of legacies, see *Smith v. Cairns*, 92 Tex. 667 (51 S. W. Rep. 498); *Cole v. Proctor*, 17 Tenn. (54 S. W. Rep. 674).

**Sec. 450. Charging land with one's support.** A charge upon land for the support of certain persons named in a will devising it to another is not created by a desire expressed therein that the devisee of the land shall take care of such person, *Perdue v. Perdue*, 124 N. C. 161 (32 S. E. Rep. 492); nor does a devise of land by a testator to his son "provided he takes proper care of his mother" during her life, give a lien on the land to a third party who furnishes support to the mother under a contract with her, *McQuerry v. Wilson*, Ky. (50 S. W. Rep. 1099; 21 Ky. Law Rep. 112). A stipulation in the habendum clause of a deed by the persons named therein that "Nevertheless, the maintenance of Daniel Bonebrake and Rebecca, his wife, during their natural life, is a part of the consideration therein mentioned; therefore this title does not become clear of all incumbrance until at

the death of the said Daniel Bonbrake and Rebecca, his wife," expressly charges upon the premises conveyed the maintenance of the grantors and makes this charge a continuing lien thereon. *Bonebrake v. Summers*, 193 Pa. St. 22 (44 Atl. Rep. 330).

**Sec. 451. Lis pendens—General principles—Statutes construed.** More than twenty years delay in the prosecution of foreclosure proceedings will relieve a purchaser of the property from the effect of a lis pendens notice, where there is no satisfactory excuse or explanation of the delay. *Taylor v. Carroll*, 89 Md. 32 (42 Atl. Rep. 920; 44 L. R. A. 479). Mortgaged premises may be sold under foreclosure to satisfy a portion of a debt due, and, if a lis pendens was filed at the commencement of the proceeding, the lien of the entire debt may be continued and preserved by the decree of partial foreclosure as against subsequent incumbrancers or redemptioners. The object of notice of lis pendens is to keep the res within the power of the court until final decree; and lis pendens may be defined to be the jurisdiction, power, or control which courts acquire over property involved in a suit pending the continuance of the action, and until its final judgment therein. *Dupee v. Salt Lake Val. L. & T. Co.*, 20 Utah, 103 (57 Pac. Rep. 845; 77 Am. St. Rep. 902). Construing and applying Ia. Code 1873, § 2628, it is held that upon the filing of a petition in an action affecting real estate the action will be deemed to be pending so as to charge third persons with notice of the plaintiff's rights until the final determination of the cause on appeal. *Olson v. Leibpke*, 110 Ia. 594 (81 N. W. Rep. 801; 80 Am. St. Rep. 327). Pa. Laws 1856, Act Apr. 22 construed and applied—lis pendens as notice to purchaser. *Hillsdale Coal & Iron Co. v. Heermans*, 191 Pa. St. 116 (43 Atl. Rep. 76). A creditor filing a lis pendens in attachment proceedings, under S. Dak. Comp. Laws, § 4897, thereby does not acquire priority over an unrecorded deed executed and delivered by the defendant before the filing of the attachment. *Kohn v. Lapham*, 13 S. Dak. 78 (82 N. W. Rep. 408).

**Sec. 452. Pendente lite purchasers.** A purchaser of real estate from a defendant during the pendency of an action in which it is involved acquires his interest subject to such

decree as afterward may be rendered. *Harding v. American Glucose Co.*, 182 Ill. 551 (55 N. E. Rep. 577; 74 Am. St. Rep. 189); *Spicer v. Seale*, Ky. (50 S. W. Rep. 47; 20 Ky. Law Rep. 1869). Under N. Dak. Rev. Codes, § 5233 a party who purchases property from a defendant pendente lite, with the permission of the court, may appear in the case at any stage of the proceedings and defend his interests. *Anheier v. Signor*, 8 N. Dak. 499 (79 N. W. Rep. 983). A purchaser of land after judgment affecting it rendered in the supreme court, during the time allowed for a petition for a rehearing takes subject to further review of the case on the rehearing. *Bird v. Gilliam*, 125 N. C. 76 (34 S. E. Rep. 196).

**Sec. 453. Miscellaneous notes and statutes.** Attachment liens acquired against a grantee pending an action to set aside the conveyance under which he claims title are unavailing against the complainants in such action, the deed being set aside. *Kinnah v. Kinnah*, 184 Ill. 284 (56 N. E. Rep. 376). As to the power of the state to destroy liens, see *People v. Adirondack Ry. Co.*, 160 N. Y. 225 (54 N. E. Rep. 689). Cal. Code Civ. Proc., § 728 construed and applied—enforcement of lien when not all of debt is due. *Higgins v. San Diego Sav. Bank*, 129 Cal. 184 (61 Pac. Rep. 943). Ga. Civ. Code, § 2814 construed and applied—attorney's lien against real estate. *Hodnett v. Bonner*, 107 Ga. 452 (33 S. E. Rep. 416). The lien of an attorney for his fees, given by this statute, may be enforced in the same manner as is provided by law for the foreclosure of mortgages on realty. *Ray v. Hixon*, 107 Ga. 768 (33 S. E. Rep. 692). N. J. Laws 1855, pp. 448, 471, 475 construed and applied—priority of assessments for water supply by city of Hoboken over mortgages and other liens—provisions of statutes discussed. *Hudson Trust & Sav. Inst. v. Carr-Curran Paper-Mills Co.*, 58 N. J. Eq. 59 (43 Atl. Rep. 418).

## MARRIED WOMEN

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### EPITOME OF CASES.

**Sec. 454. Equitable power of married woman to bind future property by contract.** In construing Neb. Comp. Stat. 1899, ch. 53, § 2, conferring upon married women power to contract in reference to their separate estate, it is held that the effect of the statute is to give to married women, as a legal right, the power over their property which in equity they already possessed; and the court further holds that the power of a married woman in equity to bind her separate estate by contract extends only to such estate as she has at the time of the contract. *Kocher v. Cornell*, 59 Neb. 315 (80 N. W. Rep. 911). On the last point, the court say: "Whether she possessed power independent of statute to bind by contract property subsequently acquired has been before the English courts in several cases. In *Pike v. Fitzgibbon*, 17 Ch. Div. 454, Brett, L. J., discussing the question, said: 'The decisions appear to me to come to this: That certain promises (I use the word "promises" in order to show that, in my opinion, they are not contracts) made by a married woman, and acted upon by the persons to whom they are made on the faith of the fact known to them of her being possessed at the time of a separate estate, will be enforced against such separate estate as she was possessed of at that time, or so much of it as remains at the time of judgment recovered.' In the same case, James, L. J., after observing that the point was not necessarily involved, took occasion to remark. 'It is, therefore, sufficient to state as a warning in any future case that the only separate property which can be reached is the separate property \* \* \* that a married woman had at the time of contracting the engagement which it is sought to enforce.' The question was afterwards directly presented for decision in *King v. Lucas*, 23 Ch. Div. 712, and it was there held that the contract of a married woman could only be enforced against the separate estate existing at the date of the

contract. Following these precedents, it was decided in *Ankeney v. Hannon*, 147 U. S. 118 (13 Sup. Ct. Rep. 206; 37 L. Ed. 105), that, in the absence of special legislation, the property which a married woman obtained by inheritance after the execution of the contract upon which the action was brought was not bound, although there was an express declaration of her intention to charge 'her separate estate, both real and personal.' Other authorities supporting this view are *Crockett v. Doriot*, 85 Va. 240 (3 S. E. Rep. 128); *Filler v. Tyler*, 91 Va. 458 (22 S. E. Rep. 235); *Roberts v. Watkins*, 46 Law J. Q. B. 552; *Clark*, Cont. 280; 3 Pom. Eq. Jur. (1st Ed.), § 1123. A mere hope of succession to an estate is not property; and authority to contract with reference to, and upon the faith and credit of, the separate estate of a married woman, cannot be said, by any fair construction of language, to include it."

**Sec. 455. Estoppels applied to married women.** A married woman may be bound by an estoppel in pais, *Town of Johnson City v. Wolfe*, 103 Tenn. 227 (52 S. W. Rep. 991); and where her possession of land simply is that of her husband, she is bound by the same estoppels that bind him, *Woods v. Soucy*, 184 Ill. 568 (56 N. E. Rep. 1015). The fact that a married woman in writing consented to and approved a security deed executed by the husband, conveying land to which he had title, does not estop her from subsequently assailing such deed as void for usury, she having taken a conveyance of the land from him before the action was brought against him on the second debt. *Cade v. Larned*, 109 Ga. 292 (34 S. E. Rep. 566). In Kentucky it is held that while a contract for the sale of land by a married woman which she has no authority to make cannot become binding upon her through estoppel, if she repudiate such contract the land may be subjected to the payment of the sums paid by the purchasers on the purchase price. *Kern v. Raunser*, Ky. (50 S. W. Rep. 838; 20 Ky. Law Rep. 1954).

**Sec. 456. Equities of a married woman as against her husband's creditors.** A wife who has acquiesced in her husband taking title in his own name to land purchased with her money, after he has obtained credit by reason thereof, cannot hold the land under a subsequent conveyance to her



by him, as against the intervening creditors. *Talbott v. Gillespie*, Ky. (53 S. W. Rep. 1047; 21 Ky. Law Rep. 1065); *Morris v. Fletcher*, 67 Ark. 105 (56 S. W. Rep. 1072; 77 Am. St. Rep. 87). A wife having an equitable title to land conveyed to her husband on account of its being purchased with funds belonging to her, cannot assert her ownership thereof as against a third person, who, in ignorance and without notice of her secret equity, and on the faith of her husband's apparent title, makes to him in good faith a loan secured by a mortgage on such land; but in case of the husband's insolvency she may show that such mortgage debt is infected with usury and compel the holder thereof to purge his claim of the usury charged against their common debtor. And to this end she may, even after the foreclosure of the mortgage, avail herself of the statutory remedy provided for by Ga. Civ. Code, § 2769, whereby the creditor is permitted, upon specified terms, "to contest the validity or fairness of a mortgage lien or debt," prejudicially affecting his interests as such. *Parker v. Barnesville Sav. Bank*, 107 Ga. 650 (34 S. E. Rep. 365).

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#### SEPARATE REAL ESTATE.

[In Vol. II §§ 381-428; Vol. III, §§ 470-493; Vol. IV, §§ 466-492; Vol. V, §§ 479-508; Vol. VI, §§ 502-526; Vol. VII, §§ 455-474, will be found a compilation of the statutes and decisions of the several states and territories on the subject of Separate Real Estate of Married Women. Below we give such amendments, changes and additional constructions as have been made.]

##### Sec. 457. Alabama.

(See Vol. II, § 381; Vol. III, § 470; Vol. IV, § 466; Vol. V, § 479; Vol. VI, § 502; Vol. VII, § 455.) Under Code 1886, § 2348, a deed of a married woman in the execution of which her husband does not join, or consent in writing or otherwise to her signing it, is void. *Brown v. Hunter*, 121 Ala. 210 (25 So. Rep. 924). It is not sufficient for a husband merely to sign the deed with his wife, but his name must appear in the body thereof as joining in its execution. *Adams v. Teague*, 123 Ala. 591 (26 So. Rep. 221). Under Code 1896, § 2529, a married woman cannot become surety for her husband either directly or indirectly; and a contract by her of that character

is void, confers no title upon the one claiming thereunder, may be assailed by her in any action where it is sought to be enforced, and cannot be validated by an estoppel against her. *Richardson v. Stephens*, 122 Ala. 301 (25 So. Rep. 39); *Price v. Cooper*, 123 Ala. 392 (26 So. Rep. 238).

#### **Sec. 458. Arkansas.**

(See Vol. II, § 383; Vol. III, § 471; Vol. IV, § 467; Vol. V, § 480; Vol. VI, § 503.) One seeking to enforce a contract of a married woman must show that it is such a contract as she had power to make. *Warner v. Hess*, 66 Ark. 113 (49 S. W. Rep. 489). Laws 1895, ch. 58 construed and applied—power of married women to make executory contracts. *Sparks v. Moore*, 66 Ark. 437 (56 S. W. Rep. 1064).

#### **Sec. 459. California**

(See Vol. II, § 384; Vol. III, § 472; Vol. V, § 481; Vol. VII, § 456.) "A married woman may sue or be sued, and may prosecute or defend any action or proceeding, as if unmarried." Statutes and Amendments to the Codes 1901, p. 126, § 45.

#### **Sec. 460. Florida.**

(See Vol. II, § 389; Vol. III, § 475; Vol. IV, § 469; Vol. VI, § 505; Vol. VII, § 457.) A certificate of a married woman's acknowledgment to a conveyance of her separate property to the effect "that she signed the same freely, and relinquished all dower and right of dower," does not comply with Rev. Stat., § 1958, requiring a married woman's certificate of acknowledgment to a conveyance of her separate real estate to show that she "executed the same freely and without compulsion, constraint, apprehension, or fear of or from her husband." *Durham v. Stephenson*, 41 Fla. 112 (25 So. Rep. 284).

#### **Sec. 461. Georgia.**

(See Vol. II, § 390; Vol. III, § 476; Vol. IV, § 470; Vol. V, § 483; Vol. VI, § 506; Vol. VII, § 458.) A deed executed in 1858, conveying certain described property to C. in trust for the sole and separate use of M. G. H., the grantor's wife, for and during her natural life, and at her death to her children, the issue of the existing marriage between her and the grantor,—said children to share equally in the same,—vested in the trustee named the title to the life estate only, and not to the estate in remainder. *Allen v. Hughes*, 106 Ga. 775 (32 S. E. Rep. 927). Where a husband made to his wife a conveyance of land upon which he had previously executed a mortgage to a third person, and the wife, being thus clothed with the title, borrowed money, and gave her promissory note for the same, intending to use a portion thereof in paying off the incumbrance, which was in fact done, she could not, although the intention to pay off the incumbrance was known

to the lender at the time the loan was made, defeat a recovery by the lender upon the note, either in whole or in part, upon the ground that it was given for her husband's debt, or for money with which to pay the same. *Taylor v. American Freehold Land-Mortg. Co.*, 106 Ga. 238 (32 S. E. Rep. 153). A married woman, who acquired, for value, title to property by deed from her husband, and executed a mortgage thereon to her creditor, cannot, when, subsequent to the date of the mortgage, the property is levied on as the property of her husband, under a judgment rendered on a cause of action arising after the date of the mortgage, by interposing a claim to the property, and submitting to a judgment finding the same subject, prejudice in any way the rights of her mortgage creditor, or of the purchaser at the sale had under a foreclosure of such mortgage, notwithstanding that such foreclosure and sale was had while the claim case was pending. *Patapasco Guano Co. v. Hurst*, 106 Ga. 184 (32 S. E. Rep. 136).

#### **Sec. 462. Idaho.**

(See Vol. II, § 391; Vol. III, § 477; Vol. V, § 484; Vol. VII, § 459.) The statutes do not empower a married woman to make an olographic will. *Scott v. Harkness*, Ida. (59 Pac. Rep. 556).

#### **Sec. 463. Indiana.**

(See Vol. II, § 393; Vol. III, § 479; Vol. IV, § 472; Vol. V, § 485; Vol. VI, § 507; Vol. VII, § 460.) Construing and applying Rev. Stat. 1894, § 6964 (Rev. Stat. 1901, § 6964), making a contract of suretyship by a married woman void, it is held that a complaint to recover on a note signed by her and her husband and to foreclose a mortgage on her separate real estate given to secure the same must allege facts showing that she was the principal in such contract, and the burden of proving this is upon the plaintiff; but where the note is executed by the wife alone, there is no presumption that she is surety and the burden of proving suretyship rests upon her. Whether a married woman is surety will be determined not by the form of the contract nor from the basis upon which the transaction was had, but from an inquiry as to whether the wife received, in person or estate, the benefit of the consideration upon which the contract rests. *Field v. Noble*, 154 Ind. 357 (56 N. E. Rep. 841). A mortgage to secure the husband's debt, executed by a husband and wife upon land previously owned by them by entireties, the title to which they had conveyed to the husband through a third party by conveyance without any consideration, is voidable as to either of them on account of being within Rev. Stat. 1894, § 6964 (Rev. Stat. 1901, § 6964), prohibiting married women from executing contracts of suretyship for others, where the party accepting such security knew at the time that the contrivance was resorted to for the purpose of evading the law; but under § 6962 (Rev. Stat. 1901, § 6962), the wife may estop herself to question the validity of such a mortgage

as against a mortgagee ignorant of the facts and to whom she by her silence represented her husband to be the owner of the land, while they both were acting together in procuring the loan. *Government Bldg. & L. Inst. v. Denny*, 154 Ind. 261 (55 N. E. Rep. 757). The principle of this case is supported by *Abicht v. Searls*, 154 Ind. 594 (57 N. E. Rep. 246). See opinion in this case for particular facts held insufficient to estop the wife from attacking such a mortgage. An estoppel against a married woman's setting up her suretyship as a defense to an action to foreclose a mortgage on her separate real estate given to secure her note, is not shown by allegations that she solicited the loan, represented to the plaintiff that it was for her sole benefit, and that he paid the loan to her. *Field v. Noblett*, 154 Ind. 357 (56 N. E. Rep. 841).

#### Sec. 464. Kansas.

(See Vol. II, § 395.) A married woman is liable on her endorsement of her husband's note, and this liability may be enforced against her separate real estate in another state. *State Bank of Eldorado v. Maxson*, 123 Mich. 250 (82 N. W. Rep. 31).

#### Sec. 465. Kentucky.

(See Vol. II, § 396; Vol. III, § 480; Vol. IV, § 474; Vol. V, § 486; Vol. VI, § 508; Vol. VII, § 461.) To charge the separate estate of a married woman with the payment of her debts, facts must be averred showing that such was the agreement at the time of the contract. *Benson v. Simmers*, Ky. (53 S. W. Rep. 1035; 21 Ky. Law Rep. 1060). Funeral expenses of a wife properly are chargeable against her estate, but her husband is liable for necessary expenses of a physician on her account. *Towery v. McGaw*, Ky. (56 S. W. Rep. 727). Construing and applying Stat., §§ 2128, 2129, it is held that a deed of a married woman in the execution of which her husband joins is valid, though not lodged for record until after her death. *Crawford v. Tate*, Ky. (49 S. W. Rep. 307; 20 Ky. Law Rep. 1314). The statute requiring the joinder of a husband with his wife in the sale of her real estate does not make him a necessary party to an action to enforce a lien against it. *Rhodes v. People's Sav. & Bldg. Ass'n*, Ky. (52 S. W. Rep. 1050; 21 Ky. Law Rep. 747). Under Gen. Stat., ch. 113, § 4, she has no power to dispose of her general estate without the consent of her husband. *Hughes v. Faulkner*, Ky. (56 S. W. Rep. 642). Stat., §§ 2128, 2479, construed and applied—power of married woman to create mechanic's lien upon her property. *Tarr v. Muir*, Ky. (53 S. W. Rep. 663; 21 Ky. Law Rep. 988). Civ. Code Prac., § 491 applied—sale of married woman's lands for reinvestment. *Chenault v. Chenault*, Ky. (56 S. W. Rep. 728). Stat., § 2127 provides that "no part of a married woman's estate shall be subject to the payment or satisfaction of any liability upon a contract made after marriage to answer for the debt, default or misdoing of another, includ-

ing her husband, unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance." *Travers v. Wood*, Ky. (50 S. W. Rep. 60; 20 Ky. Law Rep. 1819). Under this statute a note of a married woman executed in payment of her husband's note is void. *Milburn v. Jackson*, Ky. (52 S. W. Rep. 949; 21 Ky. Law Rep. 700); *Deposit Bank v. Stitt*, Ky. (52 S. W. Rep. 950; 21 Ky. Law Rep. 671). A husband purchasing land prior to the Act of Mar. 15, 1894, which he caused to be conveyed to his wife, and for the purchase price of which they executed notes, is liable personally for such notes, and the land may be subjected to their payment. *Morgan v. Morgan*, Ky. (49 S. W. Rep. 184; 20 Ky. Law Rep. 1308). Under this statute she cannot bind herself by a contract of suretyship, and she may show that she is surety merely on a note purporting to be the joint obligation of herself and husband. *Skinner v. Lynn*, Ky. (51 S. W. Rep. 167; 21 Ky. Law Rep. 185). Prior to this statute a married woman empowered by a decree to contract and be contracted with as a feme sole could bind herself by a contract to become surety for her husband. *Skinner v. Carr*, Ky. (51 S. W. Rep. 799; 21 Ky. Law Rep. 525). Where a wife joins the husband in the mortgage of lands to secure the payment of a note owing by the husband, she does not become the surety of the husband, and is not personally bound; but the pledge of the land remains in full force and effect, notwithstanding the note may have been frequently renewed without her knowledge or consent. *New Farmers' Bank's Trustees v. Blythe*, Ky. (53 S. W. Rep. 409; 21 Ky. Law Rep. 1033). A debt created for the purchase of a city home by a wife for \$7,000, for which the notes of herself and husband are given, is not a debt for necessities, to the payment of which her general estate, consisting of only a life estate in 100 acres of land, can be subjected. *Herr v. Lane*, Ky. (50 S. W. Rep. 545; 20 Ky. Law Rep. 1950).

#### Sec. 466. Louisiana.

(See Vol. II, § 397; Vol. IV, §475; Vol. V, § 487; Vol. XI, § 509.) The lender who lends money to a married woman is not required to inquire into the purpose of the loan, when she is duly authorized by the court to borrow a specific amount. The judicial admissions of the wife when being examined by the judge that the amount she was about to borrow, when she appeared before the judge, was to be used for her separate advantage, and the preponderance of testimony showing that the lender was not aware that the purpose of the wife was other than that shown by the certificate, will conclude the wife, and render it impossible for her to have the mortgage decreed a nullity. *Saufley v. Joubert*, 51 La. Ann. 1048 (25 So. Rep. 934).

#### Sec. 467. Mississippi.

(See Vol. II, § 403; Vol. IV, § 478; Vol. V, § 491.) Code, § 2700,

applied—liability of wife's separate estate for contract for improvements made with her husband. *Fairbanks Co. v. Briley*, Miss. (25 So. Rep. 354).

#### **Sec. 468. Missouri.**

(See Vol. II, § 404; Vol. III, § 483; Vol. IV, § 479; Vol. V, § 492; Vol. VI, § 513; Vol. VII, § 466.) A married woman's separate estate is not dependent upon her living with her husband. *Woodward v. Woodward*, 148 Mo. 241 (49 S. W. Rep. 1001). A wife, without the joinder of the trustee, may convey her equitable estate in lands conveyed to a trustee by her husband for her use and which the trustee is empowered to sell, convey, mortgage or lease as she may direct in writing. *Ryland v. Banks*, 151 Mo. 1 (51 S. W. Rep. 720). See opinion for discussion of this subject. A personal judgment for costs cannot be rendered against a married woman in an action for partition brought by her. *Hinkle v. Kerr*, 148 Mo. 43 (49 S. W. Rep. 864). Rev. Stat. 1889, § 6869 construed and applied—effect of statute upon husband's common law right to reduce wife's property to his possession. *Winn v. Riley*, 151 Mo. 61 (52 S. W. Rep. 27; 74 Am. St. Rep. 517). Rev. Stat. 1889, § 6869, does not prevent a married woman from maintaining a suit in equity against her husband. *Woodward v. Woodward*, 148 Mo. 241 (49 S. W. Rep. 1001).

#### **Sec. 469. Nebraska.**

(See Vol. II, § 406; Vol. III, § 484; Vol. IV, 481; Vol. VI, § 514; Vol. VII, § 467.) Comp. Stat. 1899, ch. 53, § 2, conferring power upon married women to contract in reference to their separate estate simply gives legal recognition to an equitable power which they already possessed; and does not authorize a married woman to bind by contract a separate estate which she afterward may acquire. *Kocher v. Cornell*, 59 Neb. 315 (80 N. W. Rep. 911). For fuller statement of this case, see first section in this chapter. Her separate estate is not chargeable for necessities for the family until a judgment has been entered therefor against the husband and an execution returned unsatisfied. *Fulton v. Ryan*, 60 Neb. 9 (82 N. W. Rep. 105). For a discussion as to whether the devise of her separate real estate by a married woman will exclude her husband's estate by curtesy, see *Vandever v. Higgins*, 59 Neb. 333 (80 N. W. Rep. 1043).

#### **Sec. 470. New Jersey.**

(See Vol. II, § 409; Vol. IV, § 482; Vol. V, § 494; Vol. VI, § 516.) "Any deed or deeds of conveyance of the lands of any married woman heretofore or hereafter made, acknowledged and delivered by her in which the husband of such married woman joined or shall join by attorney duly constituted by power of attorney executed by the

husband authorizing such attorney to join in the conveyance of the lands of the wife, shall be as good and effectual to pass the estate of the said married woman as if her husband had personally joined in the making, execution and delivery of such deed or deeds." Laws 1901, p. 226. "Any married woman who is entitled to an estate for her life only in any real estate in this state may execute a conveyance of the same without her husband joining therein, and such conveyance when duly acknowledged shall be good and effectual to convey her life estate in such real estate in the same manner and with the like effect as if she were sole and unmarried." Laws 1901, p. 384. A joint obligation by a married woman and her husband executed to secure his debt is void as to her. *Seigman v. Streeter*, 64 N. J. L. 169 (44 Atl. Rep. 888). She cannot bind her separate estate by an agreement to pay a certain sum agreed upon as a settlement of a claim for damages for an assault committed by him. *Mawhinney v. Cassio*, 63 N. J. L. 412 (43 Atl. Rep. 676). The fact that a married woman is the owner of a majority of the stock in a corporation does not enable her to bind herself to pay its debts. *Allen v. Beebe*, 63 N. J. L. 377 (43 Atl. Rep. 681). For particular case in regard to enforcement of a married woman's contract of suretyship against her estate, see *Shipman v. Lord*, 58 N. J. Eq. 380 (44 Atl. Rep. 215).

#### **Sec. 471. New Mexico.**

(See Vol. II, § 410.) A married woman has the same property rights and the same power to convey or contract as if she were unmarried. Laws 1901, p. 113, § 5.

#### **Sec. 472. North Carolina.**

(See Vol. II, § 412; Vol. III, § 485; Vol. IV, § 484; Vol. V, § 496; Vol. VI, § 517; Vol. VII, § 468.) A conveyance of land in fee to a trustee, "to hold the same for the sole and separate use of [a married woman], and to allow her to live upon the same, or retain the rents and profits thereof, free from the interest of her present or any future husband, as completely as if she were a feme sole; and to sell and reinvest the proceeds in other personal or real property, to be held on the same terms and trust as specified herein, and no other," vests a fee-simple trust estate in such wife. *Johnson v. Blake*, 124 N. C. 106 (32 S. E. Rep. 397). A contract by a married woman for the erection of a house upon her separate real estate is not a contract for "her necessary personal expenses or for the support of the family," within the meaning of Code, § 1826. *Weathers v. Borders*, 124 N. C. 610 (32 S. E. Rep. 881). She cannot transfer a note without the written consent of her husband. *Walton v. Bristol*, 125 N. C. 419 (34 S. E. Rep. 544).

**Sec. 473. Ohio.**

(See Vol. II, § 412a; Vol. III, § 486.) Prior to the act of March 19, 1887, "to define the rights and liabilities of husband and wife" (84 Ohio Laws, p. 132), it was not competent for a married woman to dedicate to public use any lands which were a part of her general estate, except in the mode prescribed by statute. Lands of which a married woman became seized prior to the passage of the act of April 3, 1861, "concerning the rights and liabilities of married women" (58 Ohio Laws, p. 54), became in law subject to the possession of the husband, and until his death a right of action did not accrue to her to recover possession thereof from one who, during her coverture, had taken it without right. *Westlake v. City of Youngstown*, 62 O. St. 249 (56 N. E. Rep. 873).

**Sec. 474. Oregon.**

(See Vol. II, § 415.) Applying Hill's Ann. Laws, §§ 2992, 2997, 2998, it is held that a wife joining her husband in the execution of a mortgage on his real estate to secure his debt, is personally liable on the covenant therein to pay the debt, and such liability is enforceable out of her separate property. *First Nat. Bank v. Leonard*, 36 Or. 390 (59 Pac. Rep. 873).

**Sec. 475. Pennsylvania.**

(See Vol. II, § 416; Vol. III, § 487; Vol. IV, § 485; Vol. V, § 499; Vol. VI, § 519; Vol. VII, § 469.) Pub. Laws 1855, p. 430, construed and applied—power of married women to dispose of her property by will. In *re Seltzer's Estate*, 189 Pa. St. 574 (42 Atl. Rep. 289). A certificate of an officer of a married woman's acknowledgment to a mortgage is conclusive as to her privy examination, as against a mortgagee without notice, where her signature to the mortgage is admitted. *Pennsylvania Trust Co. v. Kline*, 192 Pa. St. 1 (43 Atl. Rep. 401).

**Sec. 476. South Carolina.**

(See Vol. II, § 418; Vol. III, § 489; Vol. IV, § 487; Vol. V, § 501; Vol. VI, § 520; Vol. VII, § 470.) Under Rev. Stat. 1893, § 2167, a married woman may purchase a claim against her husband and secure the purchase price thereof by a mortgage on her land. *Ellis v. Crib*, 55 S. C. 328 (33 S. E. Rep. 484). As to her power to enter into a contract of partnership and liability on bond given for partnership debt, see *Collins v. Hall*, 55 S. C. 336 (33 S. E. Rep. 466). 19 Stat. at Large, p. 819 construed and applied—conveyance by married woman of her separate estate—necessity of declaration in conveyance of her intention to convey. *Carroll v. Thomas*, 54 S. C. 520 (32 S. E. Rep. 497).

**Sec. 477. Tennessee.**

(See Vol. II, § 420; Vol. III, § 490; Vol. IV, § 488; Vol. V, § 502;



Vol. VI, § 521; Vol. VII, § 471.) A married woman may be bound by an estoppel in pais. *Gilbert v. Richardson*, Tenn. (51 S. W. Rep. 134); *Town of Johnson City v. Wolfe*, 103 Tenn. 227 (52 S. W. Rep. 991). A mortgage executed by a feme sole is extinguished by her subsequent marriage to the mortgagee, as at common law, and this rule is not changed by the married women's statutes. *Schilling v. Darmody*, 102 Tenn. 439 (52 S. W. Rep. 291; 73 Am. St. Rep. 892). Citing *Long v. Kinney*, 49 Ind. 235. In order to bind the separate estate of a married woman there must be an express agreement or contract to bind the same; it will not be charged by implication. *Dismukes v. Shafer*, Tenn. (54 S. W. Rep. 671). A married woman can not execute a valid and effective power of attorney to convey real estate, but can only convey by deed setting out the contract, in the execution of which her husband joins her, and with a privy examination complying in all respects with the express provisions of the statute. *McCreary v. McCorkle*, Tenn. (54 S. W. Rep. 53). A married woman's property can be bound for mechanics' and furnishers' liens only where there is a written contract signed by her. *Cage v. Lawrence*, Tenn. (57 S. W. Rep. 192). Under Laws 1897, p. 82, a married woman is liable for rent for buildings occupied by her in conducting a mercantile or manufacturing business. *Persica v. Maydwell*, 102 Tenn. 207 (52 S. W. Rep. 145).

#### **Sec. 478. Texas.**

(See Vol. II, § 421; Vol. III, § 491; Vol. IV, § 489; Vol. V, § 503; Vol. VI, § 522.) A married woman may, with the consent of her husband, make a settlement upon and purchase public lands. *Barnett v. Murray*, Tex. Civ. App. (54 S. W. Rep. 784).

#### **Sec. 479. Utah.**

(See Vol. II, § 422; Vol. V, § 505.) In this state women are relieved from the common-law disability and are given independent power to manage, control, transfer, and dispose of, hold, and enjoy, their separate property, without restriction or limitation by reason of marriage, and to contract with reference thereto in the same manner as if they were sole. *Morrison v. Clark*, 20 Utah, 432 (59 Pac. Rep. 235; 77 Am. St. Rep. 924).

#### **Sec. 480. Virginia.**

(See Vol. II, § 424; Vol. III, § 492; Vol. IV, § 490; Vol. V, § 504; Vol. VI, § 524; Vol. VII, § 473.) Under Code, § 2288, a married woman is held incapable of making a contract unless she owns separate property at the time the contract is made. *Hirth v. Hirth*, 98 Va. 121 (34 S. E. Rep. 964). Laws 1876-77, pp. 333, 334; Laws 1877-78, pp. 247, 248 construed and applied—statutory separate estate and equitable separate

estate of married woman. *Jones v. Jones' Ex'r*, 96 Va. 749 (32 S. E. Rep. 463).

**Sec. 481. Washington.**

(See Vol. II, § 425; Vol. V, § 507.) Lands entered upon and improved by a woman as a homestead claim for several years prior to her marriage, to which she acquires a patent after marriage, constitute her separate property. *Forker v. Henry*, 21 Wash. 235 (57 Pac. Rep. 811).

**Sec. 482. West Virginia.**

(See Vol. II, § 526; Vol. III, § 493; Vol. IV, § 491; Vol. V, § 508; Vol. VI, § 525; Vol. VII, § 474.) Land conveyed to a married woman as her separate estate is subject to a vendor's lien reserved in the conveyance. *Burbridge v. Sadler*, 46 W. Va. 39 (32 S. E. Rep. 1028). Laws 1893, chs. 3, 43, defining the rights and powers of a married woman as to her separate estate, do not deprive the husband of his right to an estate by the curtesy. *Alderson's Adm'r v. Alderson*, 46 W. Va. 242 (33 S. E. Rep. 228). Where a deed of trust executed by a husband and wife to secure his debt includes property in which each hold separate interests, but her interest was included only as an additional security, equity will require that his portion of the property be exhausted before selling that of the wife. *Jones v. Thorn*, 45 W. Va. 186 (32 S. E. Rep. 173). Code, ch. 66, § 12, as amended by Laws 1891, ch. 109, construed and applied—particular contract by married woman for the erection of improvements on her separate estate, held to be valid. *Fouse v. Gilfillan*, 45 W. Va. 213 (32 S. E. Rep. 178).

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## MECHANICS' LIENS

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### EPITOME OF CASES.

**Sec. 483. Constitutionality and construction of mechanics' lien statutes.** Ky Stat., § 2463, providing that "a person who performs labor or furnishes materials in the erection, altering or repairing a house, building or other structure \* \* \* or the improvement, in any manner of real estate, by contract with, or by the written consent of, the owner, contractor, subcontractor, architect or authorized agent, shall have a lien thereon," is constitu-

tional, though it gives a lien without regard to the state of the account between the owner and the contractor; but this statute does not give a lien to a materialman furnishing material under a contract with another materialman. *Hightower v. Bailey*, Ky. (56 S. W. Rep. 147; 49 L. R. A. 255). See opinion for exhaustive collation of authorities on the constitutionality of such statutes. Mechanics' lien statutes are in derogation to the common law and must be strictly construed. *May, Purington & B. Brick Co. v. General Engineering Co.*, 180 Ill. 535 (54 N. E. Rep. 638). Cal. Code Civ. Proc., § 1183 construed and applied—filing and recording building contract. *Donnelly v. Adams*, 127 Cal. 24 (59 Pac. Rep. 208); *L. W. Blinn Lum. Co. v. Walker*, 129 Cal. 62 (61 Pac. Rep. 664). One leasing machinery to a third person occupying a mining claim which is permanently attached thereto by him is not an owner, within the meaning of Cal. Code Civ. Proc., § 1192, requiring the giving of notice in order to prevent the attaching of a lien to his machinery on account of labor furnished to the occupant of the claim. *Jordan v. Myres*, 126 Cal. 565 (58 Pac. Rep. 1061). 16 Del. Laws, p. 206 construed and applied—who are contractors and subcontractors. *Travis v. Meredith*, 22 Marv (Del.) 376 (43 Atl. Rep. 176). Proprietors of a sawmill asserting a lien for sawing timber into lumber must assert such lien not as mechanics, but as proprietors of the mill, under Ga. Civ. Code, § 2807. *Evans v. Beddingfield*, 106 Ga. 755 (32 S. E. Rep. 664). Ky. Stat., §§ 2128, 2479 construed and applied—power of married woman to create mechanic's lien upon her property. *Tarr v. Muir*, Ky. (53 S. W. Rep. 663; 21 Ky. Law Rep. 988). For exhaustive discussion as to the constitutionality and construction of Mich. Laws 1891, No. 179, as amended by Laws 1893, No. 199, see *Smalley v. Gearing*, 121 Mich. 190 (79 N. W. Rep. 1114); *Jossman v. Rice*, 121 Mich. 270 (80 N. W. Rep. 25; 80 Am. St. Rep. 493). Mich. Comp. Laws, § 10713 construed and applied—sworn statement by contractor to owner of amount due subcontractors, laborers and materialmen, as a prerequisite to his right to a lien. *Kerr-Murray Mfg. Co. v. Kalamazoo Meat, L. & P. Co.*, 124 Mich. 111 (82 N. W. Rep. 801). Mo. Rev. Stat. 1889, ch. 102, art 4 construed and applied—lien against railroads for labor and

material furnished in their construction—property subject to and how lien may be enforced. *Bethune v. Cleveland, St. L. & K. C. Ry. Co.*, 149 Mo. 587 (51 S. W. Rep. 465). 1 Hill's Wash. Code, § 1671, requiring notice from the owner to prevent a lien attaching to his lands, is repealed by Laws 1893, ch. 24. *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619 (59 Pac. Rep. 507; 75 Am. St. Rep. 862). Wis. Rev. Stat., § 3314 construed and applied—lien for digging well—designation of amount of land upon which lien is claimed. *McAuliffe v. Jorgenson*, 107 Wis. 132 (82 N. W. Rep. 706).

**Sec. 484. Vested right to lien—Effect of change in law.** When the lien of a materialman has, under the terms of the statute, become fixed and secured, such lien is then a vested right, and no subsequent repeal or modification of the act under which it became fixed can destroy or modify such right. *Waters v. Dixie Lumber & Mfg. Co.*, 106 Ga. 592 (32 S. E. Rep. 636; 71 Am. St. Rep. 281); *Craig v. Herzman*, 9 N. Dak. 140 (81 N. W. Rep. 288). See both cases for review of authorities on this subject. Rights under a mechanic's lien law are fixed by the law in force when the contract is made, and the labor or materials furnished, and the lien statement filed; and if subsequently the law is changed the rights thus acquired cannot be affected, but they will be enforced under the provisions of the law in force when the action to foreclose the lien is brought. *Mahon v. Surerus*, 9 N. Dak. 57 (81 N. W. Rep. 64). A statute (Ill. Laws 1895, Act June 26), giving materialmen a right to have a lien on moneys due contractors for making public improvements, cannot be enforced to the injury of one who, prior to the passage of the law, acquired a vested right to a portion of the funds due the contractor by proper assignment thereof. *Young v. Jones*, 180 Ill. 216 (54 N. E. Rep. 235).

**Sec. 485. Estate in and extent of property subject to the lien.** An equitable estate in lands may be subjected to a mechanic's lien. *Carey-Lombard Lum. Co. v. Bierbauer*, 76 Minn. 434 (79 N. W. Rep. 541). Cal. Code Civ. Proc., § 1185 construed and applied—extent of property covered by lien. *Macomber v. Bigelow*, 126 Cal. 9 (58

Pac. Rep. 312). Under Ga. Civ. Code, § 2801, a mechanic's lien is not limited to the improvement made but extends also to the real estate. *Cooper v. Jackson*, 107 Ga. 255 (33 S. E. Rep. 60).

**Sec. 486. Public property—Bond of contractor.** A mechanic's lien cannot be enforced against a public school building. *Staples v. City of Somerville*, 176 Mass. 237 (57 N. E. Rep. 380), following *Lessard v. Town of Revere*, 171 Mass. 294 (*Ballards' Law of Real Property*, Vol. VII, §§ 475, 476). Tex. Const., art. 11, § 9, exempting from forced sale and taxation property of counties devoted exclusively to the use and benefit of the public, but which provides that "nothing herein shall prevent the enforcement of the vendor's lien, the mechanic's or builder's lien, or other liens now existing," does not authorize the enforcement of a mechanic's lien for material furnished to build a county court house not existing at the time of the adoption of the constitution. *Herring-Hall-Marvin Co. v. Kroeger*, 23 Tex. Civ. App. 672 (57 S. W. Rep. 980). Where the legislature, on the ground of public policy, has withheld from contractors and subcontractors, not only the right of liens on public buildings, but also the right of attaching money in the hands of a municipality constructing them, a city council has no authority whatever, express or implied, to provide a new remedy in the nature of attachment, lien, or trust of any kind, whereby subcontractors may enforce payment of their claims out of money due the principal contractor. *Leslie v. Kite*, 192 Pa. St. 268 (43 Atl. Rep. 959). *Hill's Ann. Wash. Stat. & Codes*, §§ 2415, 2416 construed and applied—contract by county commissioners for public improvements—bond of contractor to pay laborers and materialmen. *Rounds v. Whatcom Co.*, 22 Wash. 106 (60 Pac. Rep. 139).

**Sec. 487. Kind of labor or material for which a lien may be claimed—Statutes construed.** A well designed and made for a permanent supply of water is an improvement upon land, within the meaning of Ala. Code, § 2723, giving a lien to one doing work upon or furnishing materials for "any building or improvement upon land." *Bates v. Harte*, 124 Ala. 427 (26 So. Rep. 898). Ia. Code, § 3089 construed

and applied—particular facts held to give one a lien for furnishing lumber for an “improvement on land.” *National Life Ins. Co. v. Ayres*, 111 Ia. 200 (82 N. W. Rep. 607). Under Ky. Laws 1891-93, p. 514, § 30, a lien may be claimed for labor and teams furnished for the construction or improvement of a street railroad. *Montgomery v. Allen*, Ky. (53 S. W. Rep. 813; 21 Ky. Law Rep. 1001).

**Sec. 488. Lien for planting trees, shrubbery, etc., and making walks.** A statute (Mansf. Ark. Dig., § 4402), giving a lien to any person “who shall do or perform any work or labor upon or furnish any material, machinery or fixtures for any building, erection or other improvement on land,” is held not to authorize a lien for planting and setting a hedge on land. *Eastern Arkansas Hedge-Fence Co. v. Tanner*, 67 Ark. 156 (53 S. W. Rep. 886). Construing and applying Shannon’s Tenn. Code, § 3531, providing that “there shall be a lien upon any lot of ground or tract of land upon which a house has been constructed, built or repaired, or fixtures or machinery furnished or erected, or improvements made,” it is held that the term “improvements made” refers only to buildings or other structures, and a lien cannot be claimed under the statute for the furnishing and planting of flowers, tress and shrubbery, or the grading and graveling of walks. *Nanz v. Cumberland Gap Park*, 103 Tenn. 299 (52 S. W. Rep. 999; 47 L. R. A. 273; 76 Am. St. Rep. 650). The court say: “In *Pratt v. Duncan*, 36 Minn. 545 (32 N. W. Rep. 709; 1 Am. St. Rep. 697), it is stated that the statute of Minnesota gives a lien for the erection, alteration, or repair of any house, mill, manufactory, or other building or appurtenances, and it was held that this language would not authorize a lien for improvements or operations on the soil merely, which do not enter into or contribute to the erection, alteration, or repair of any building or structure upon the land, and which are wholly unconnected with the erection of, or work upon, such artificial structures. The lien in that case was claimed for earth furnished and labor done in banking up the basement and foundation walls of the buildings on the premises, and in filling and grading the grounds for the purpose of sodding, and the lien was in that case refused. These holdings are largely based, if not altogether, upon

the special wording or phraseology of the statute under which they are made, and, while they are instructive, they are not controlling, under our statute. In the present case, the contention is that the lien rests upon a proper construction of the term used in the statute, 'improvements made.' But we think it evident, from a reading of the statute, that the improvements therein referred to are such as buildings and structures. The latter part of the section uses the expression, 'building contemplated in this section.' And this construction of these terms is strengthened by the use and the connection in which they are used in §§ 3533, 3534, 3540, 3542, Shannon's Code. In Missouri, where the decisions are very liberal in sustaining and extending the lien, it has been held that the word 'improvements' will not cover engines, boilers, etc. *Collins v. Mott*, 45 Mo. 100. In *Brown v. Wyman*, 56 Ia. 452 (9 N. W. Rep. 344; 41 Am. Rep. 117), it is held that a person who breaks a prairie, and prepares it for cultivation, is not entitled to a lien given for any building, erection, or 'improvement upon land.' In this case it was said that the breaking of the prairie was an improvement of the land, and so was each annual plowing. Fertilizers cause an improvement of the land, but the party who furnishes them to be put into the land has no lien for furnishing such material to make the improvement. In the case at bar the complainants 'improved' the property by putting on it flowers, shrubs, trees, and by grading, and probably graveling, the grounds and walks, but they made no erections, structures, buildings, fixtures, or machinery unless the rustic bridge may be classed as such, and there is nothing to show how or out of what it was constructed, and it was plainly but a part of the grading and furnishing the walks and drives, and an item of but little importance, as it is not separately priced, and enters into other items, valued at \$1,200. If we should hold that a mechanic's lien exists for such work at this, and such material and such improvements, we must also hold, as a logical sequence, that the person who, under a contract, fells the forest trees, and turns the soil, and puts the land in cultivation, and thus permanently improves it, has a lien for such services, and we must also hold that the dealer who furnishes the fertilizer to improve the land also has a lien, and that the laborer who undertakes to do clear-

ing, ditching, and grubbing has a lien. Indeed, we can draw the line nowhere, if it would exclude any one who does any labor or furnishes any material to permanently improve the land at any time. We think the statute refers to erections, structures, fixtures, machinery, and buildings,—things constructed upon the land,—and not to the enriching of the soil and beautifying the ground by planting flowers, shrubs, and trees on it.”

**Sec. 489. Lien for manufacturing machinery placed in building.** A lien may be claimed on a building, under Mo. Rev. Stat. 1889, § 5605, for a press brick machine sold to the owner of the building and placed in it by him with the intention of making it a permanent part of the building, regardless of the relative value of the machinery and the building or whether it was placed in the building at the time it was originally constructed or afterward, or the fact that it consisted of several parts which were separated except for the roof which covered them. *Progress Press-Brick & Mach. Co. v. Gratiot Brick & Quarry Co.*, 151 Mo. 501 (52 S. W. Rep. 401; 74 Am. St. Rep. 557, and note.) The court say: “The putting a press-brick machine in a residence or a church, or an ordinary store, would not entitle a person to a lien on the building and land therefor, because it would be plain that it was not adapted to use in such a building, and hence there could be deduced no intention to make such a machine a part of the house. But the contrary is true of a furnace put in such a building to keep it warm, and hence a lien would be allowed. *Goodin v. Association*, 5 Mo. App. 289; *Cooke v. McNeil*, 49 Mo. App. 81. The converse of the proposition is equally true. Machinery put in a manufacturing plant that is plainly (or proved to be) suitable for the transaction of the business to be carried on in the house entitles the person furnishing it to a lien, and it is wholly immaterial what the relative value of the house and the machinery may be, or whether they can be separated easily or not. A few cases will suffice to illustrate the rule: A copper kettle in a brew house. *Gray v. Holdship*, 17 Serg. & R. 413 (17 Am. Dec. 680). A steam engine in a tannery. *Oves v. Ogelsby*, 7 Watts, 106. Engine and boiler in a manufacturing plant. *Shepard v. Blossom*, 66 Minn. 42 (69 N. W. Rep. 221; 61



Am. St. Rep. 431). Gas compressor and engine in a brewery. *Watts-Campbell Co. v. Juengling*, 125 N. Y. 1 (25 N. E. Rep. 1060). Engine in a sawmill. *Morgan v. Arthurs*, 3 Watts, 140. Wheels and boxes for use in a dry kiln. *Meek v. Parker*, 63 Ark. 367 (38 S. W. Rep. 900; 58 Am. St. Rep. 119). Steel tanks for forming part of a wood-vulcanizing plant. *Haskin Wood-Vulcanizing Co. v. Cleveland Shipbuilding Co.*, 94 Va. 439 (26 S. E. Rep. 878). Bolting cloth in a flour mill. *Heidegger v. Milling Co.*, 16 Mo. App. 327."

**Sec. 490. Lien for services of architect or superintendent.** Ill. Laws 1895, p. 226 (2 Starr & C. Ann. Stat., 2nd Ed., p. 2537) gives a lien to an architect who draws plans and specifications for a building, even though he does not superintend its construction. See opinion for further construction of this statute. *Freeman v. Rinaker*, 185 Ill. 172 (56 N. E. Rep. 1055). In Nebraska it is held that an architect is entitled to a mechanic's lien upon a building which has been constructed in accordance with plans furnished by him under a contract with the owner. *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685 (79 N. W. Rep. 616). An architect who furnishes plans and specifications for a contemplated building under a contract with the land owner, is entitled to a lien for his services, under Wis. Rev. Stat., § 3314, where his plans are accepted and the construction of the building is commenced by the excavation of a part of its basement, although they afterwards were abandoned. *Fitzgerald v. Walsh*, 107 Wis. 92 (82 N. W. Rep. 717). A statute (Ind. Rev. Stat. 1894, §§ 7058, 7255 (Rev. Stat. 1901, §§ 7058, 7255) giving a lien for their services to mechanics and laborers employed about any shop, etc., who perform manual or mechanical labor, does not include a general manager of a shop. *Raynes v. Kokomo Ladder & Furniture Co.*, 153 Ind. 315 (54 N. E. Rep. 1061).

**Sec. 491. Labor on mining claim—Statutes construed.** Under Cal. Code Civ. Proc., § 1183, a lien may be claimed for labor performed in "breaking down and tearing away from the face of the drifts and mine the quartz and substance of the mine." *Chappius v. Blankman*, 128 Cal. 362 (60 Pac. Rep. 925). A lien for labor performed on a mining claim, given by this statute, does not attach to leased machinery

permanently attached to the mining claim by the person for whom the work is performed who occupied under a contract giving him the right to purchase the claim, which he did not exercise, and the right to remove the machinery in case he did not make the purchase. *Jordan v. Myres*, 126 Cal. 565 (58 Pac. Rep. 1061). Colo. Laws 1895, p. 202, giving a lien for materials and labor furnished for the development of a mine, does not apply where they are furnished under a contract made by and for the benefit of the lessee of the mine. *Wilkins v. Abell*, 26 Colo. 462 (58 Pac. Rep. 612). *Ida. Laws* 1893, p. 49 does not give a lien against a mining claim for debts incurred in its operation by one who has ousted the true owner unlawfully. *Idaho Gold Min. Co. v. Winchell*,

*Ida.* (59 Pac. Rep. 533). *Ia. Code*, § 3105 construed and applied—miners' labor lien—extent. *Mitchell v. Burwell*, 110 *Ia.* 10 (81 N. W. Rep. 193). A mine, mills and tramway do not constitute such an entirety, under *Hill's Ann. Or. Laws*, § 2669, as to render a lien for material used in erecting the mill and in constructing the tramway void because such lien was not filed against the mine also. *Watson v. Noonday Min. Co.*, 37 *Or.* 287 (60 Pac. Rep. 994).

**Sec. 492. Improvements by a vendee.** One furnishing labor and materials to a vendee which are used in the partial construction of structures which he was bound to erect upon the land by the terms of his purchase, is entitled to enforce a lien therefor; although the structures were not completed on account of the failure of the vendee. *Baker v. Waldron*, 92 *Me.* 17 (42 *Atl. Rep.* 225; 69 *Am. St. Rep.* 483). Construing and applying *Bal. Ann. Wash. Codes & Stat.*, § 5901, providing that where a person owns less than the fee in land, his interest only is subject to a mechanic's lien, it is held that a mechanic's lien arising out of the erection of improvements by a vendee in possession of land under an executory contract of purchase attaches to his interest only. *Baker v. Sinclair*, 22 *Wash.* 462 (61 *Pac. Rep.* 170).

**Sec. 493. Improvements by lessee.** A lessee of property is not the agent or representative of the lessor in the same sense as a contractor, so as to give the right to a mechanic's lien against the latter's interest to persons furnishing labor and materials to the lessee for the improvement of

the leased premises. *Wilkins v. Abell*, 26 Colo. 462 (58 Pac. Rep. 612). The court say: "In the case of subcontractors, materialmen and laborers, a lien is upheld because of the implied authority given by the owner to the contractor to employ such labor and procure the material necessary to carry out his contract. The lien must be founded 'on contract with the owner, either directly or indirectly, for it is only thus that one man can ever acquire a claim on the property of another.' Phil. Mech. Liens, §§ 58-65; *Miller v. Hollingsworth*, 33 Ia. 224; *Hopkins v. Hudson*, 107 Ind. 191 (8 N. E. Rep. 91); *Overt. Liens*, § 538. No such relation exists between a lessor and lessee. The lessee is in no sense the agent or superintendent of the lessor, nor is he a contractor, in the contemplation of the statute. *Harman v. Allen*, 11 Ga. 45; *Gould v. Wise*, 18 Nev. 253 (3 Pac. Rep. 30); *Moore v. Vaughn*, 42 Neb. 698 (60 N. W. Rep. 914); *Waterman v. Stout*, 38 Neb. 396 (56 N. W. Rep. 987); *Coburn v. Stephens*, 137 Ind. 683 (36 N. E. Rep. 132; 45 Am. St. Rep. 218). He is not employed by the lessor to do any work for him, but by the demise he acquires a qualified interest in the property, which entitles him to work the same for his own benefit. As was said in *Hopkins v. Hudson*, 107 Ind. 191 (8 N. E. Rep. 91): 'No analogy can be maintained between the case of a contractor, who is supposed to possess implied authority to bind the property of the owner, to the extent of subjecting it to a lien imposed by law in favor of subcontractors and materialmen, and that of a tenant or lessee, who has no such authority. In one case the relation warrants the inference of authority. In the other no authority is implied. The extent of the power or authority of the lessee is to bind such interest, and such only, as he possesses in the property. Unless an actual agency is established, the interest of the lessee alone is chargeable.' *Wilkerson v. Rust*, 57 Ind. 172; *McCarty v. Burnet*, 84 Ind. 23; *Muldoon v. Pitt*, 54 N. Y. 269; *Kneel. Mech. Liens*, § 43. 'In general, the interest of a lessor cannot be subjected by the lessee to a mechanic's lien for work done or materials furnished on the contract of the lessee, or of any one claiming under him. To bind the lessor's interest, his agreement or consent must be shown. Neither his agreement nor consent can be implied from the

relation existing between him and the lessee.' 2 Jones, Liens, § 1276."

Mass. Pub. Stat., ch. 191, § 1 authorizes a lien upon a building and leasehold estate of a lessee for labor and materials furnished in the erection of a building required by the lease to be erected. *Forbes v. Mosquito Fleet Yacht Club*, 175 Mass. 432 (56 N. E. Rep. 615). Mo. Rev. Stat. 1899, § 4206—mechanic's lien in cases of leased property—repealed and re-enacted. Laws 1901, p. 206. A stipulation in a lease, the rental reserved in which evidently does not take into consideration the value of any building which the lessee may erect, giving the lessee the privilege of erecting a building on the premises and providing that any building erected by him shall become the property of the lessor upon termination of the lease, does not make the lessee the agent of the lessor in the erection of such building by him so as to give a mechanic's lien on the fee. *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619 (59 Pac. Rep. 507; 75 Am. St. Rep. 862). N. Y. Laws 1885, ch. 342, § 1, as amended by Laws 1895, ch. 673, giving a lien for labor and materials furnished for a building with the consent of the owner, applies to extensive repairs and improvements made by a tenant a short time before the termination of his tenancy, and which, under the terms of the lease, were to belong to the owner, where the latter was present and inspected the work approvingly as it progressed and took possession of the premises soon after its completion, although he never expressly consented to the work. *National Wall-Paper Co. v. Sire*, 163 N. Y. 122 (57 N. E. Rep. 293).

**Sec. 494. Improvements by husband of owner.** Mich. Laws 1891, No. 179, § 2, giving a lien for labor and materials furnished upon any lands belonging to a married woman with her knowledge and consent in pursuance of a contract with her husband does not give the right to enforce the lien in such a case against a homestead which, under a constitutional provision, cannot be interfered with only through some promise in writing signed by her. *Jossman v. Rice*, 121 Mich. 270 (80 N. W. Rep. 25; 80 Am. St. Rep. 493). A lien cannot be acquired upon the lands of a married woman, under Utah Laws 1894, ch. 41, p. 44, for

materials furnished for a house erected upon her land under a contract made with her husband without her consent and against her protests, *Morrison v. Clark*, 20 Utah, 432 (59 Pac. Rep. 235; 77 Am. St. Rep. 924); but a lien may be claimed against a wife's separate property for improvements made thereon under a contract executed in her name by her husband without authority from her where she acquiesced in the making of the improvements and accepted and used the benefits arising therefrom. *Tarr v. Muir*, Ky. (53 S. W. Rep. 663; 21 Ky. Law Rep. 988). Under the statute of Nebraska which provides that any person who shall perform any labor or furnish any material for the erection of any dwelling house by virtue of a contract or agreement, expressed or implied, with the owner thereof, shall have a lien to secure the payment of the same upon such house and the lot of land upon which the same shall stand, a mechanic's lien cannot be created upon the land of a married woman for work done or materials furnished in improving such lands under a contract with her husband, where the husband acts merely for himself. The agency of the husband in such a case will not be presumed from the marital relation alone, nor from the wife's knowledge of the construction of the building on account of which the lien is claimed, accompanied by her mere failure to dissent from the proposed transaction; nor does her occupation with him of the building as the family residence constructed under a contract by him raise a conclusive presumption of her ratification thereof, so as to give a mechanic's lien therefor where none theretofore legally attached. *Rust-Owen Lum. Co. v. Holt*, 60 Neb. 80 (82 N. W. Rep. 112). Construing and applying Wis. Rev. Stat. 1878, § 3314 which permits a lien to be enforced against the real estate of any person on whose premises improvements are made, "such owner having knowledge thereof and consenting thereto," it is held that the real estate of a married woman cannot be subjected to a lien for improvements made thereon under a contract with her husband, in which he assumed to act merely for himself and which was not ratified by her in any manner except by the consent which might be implied by her living on the property with him at the time, it appearing that his dominion over her was such that any objection on her part

would have been fruitless. *Coorsen v. Zeihl*, 103 Wis. 381 (79 N. W. Rep. 562).

**Sec. 495. Subcontractors and material men.** In Alabama it is held that in order for one to enforce a lien for materials he must show that they were supplied for the purpose of being used in the building against which the lien is sought to be enforced. *Johnson v. Simmons*, 123 Ala. 564 (26 So. Rep. 650); and in California a judgment awarding a lien for materials furnished will not be sustained in the absence of a finding that they were to be used and were used in the construction of the building, *Wilson v. Nugent*, 125 Cal. 280 (57 Pac. Rep. 1008). The statutory right of one furnishing materials to claim a lien therefor and the preference given him may be asserted by one coming within the terms of the statute, regardless of the fact that he is a nonresident of the state where the materials were used and under the laws of which he seeks to enforce such rights. La. Rev. Civ. Code, § 2772 applied. *Pullis Bros. Iron Co. v. Parish of Natchitoches*, 51 La. Ann 1377 (26 So. Rep. 402). An attempt by a vendor of materials to enforce a mechanic's lien therefor, although ineffectual, amounts to an abandonment of the title reserved by him on their sale. *Hickman v. Richburg*, 122 Ala. 638 (26 So. Rep. 136). Materials furnished under distinct contracts with different persons cannot be mingled in one account and a lien obtained for the aggregate. *Badger Lumber Co. v. Stepp*, 157 Mo. 366 (57 S. W. Rep. 1059). Under the statutes of California no lien can be acquired for services rendered in hauling slate to a building to be used in roofing the same and delivering it to the contractor. A landowner retaining 25 per cent. of the contract price under the statute of California who after having knowledge of the appointment of an assignee for the benefit of the creditors of the contractor pays claims of subcontractors and materialmen without awaiting an adjudication of their validity, does so at his own risk. *Wilson v. Nugent*, 125 Cal. 280 (57 Pac. Rep. 1008).

**Sect 496. Subcontractors and material men—Fuel for mining plant.** Mont. Code Civ. Proc., § 2130, giving a lien to one furnishing material for any machinery, fixture

or building, is held not to give a lien to one furnishing coal oil for illuminating purposes, mica grease for lubricating purposes and gasoline used for fuel in a mining plant. *A. M. Holter Hardware Co. v. Ontario Min. Co.*, 24 Mont. 198 (61 Pac. Rep. 8). The court say: "The statute creating the right of the materialman to acquire a lien is the outgrowth of the principle that he who furnishes that which becomes a constituent part of real property, and is intended to enhance its value, should be given security for the price or worth thereof. The doctrine is well stated by Mr. Justice Brewer, in *Central Trust Co. v. Texas & St. L. Ry. Co.*, (C. C.) 23 Fed. Rep. 703: 'The language of the statute contains the word "fuel," in addition to the words "labor and material;" and it is claimed that the use of the word "fuel" enlarges the meaning of the word "material," and makes it broad enough to cover all supplies furnished. But for that word "fuel," there would be no question. The idea which underlies these lien statutes is that because the labor and the material have gone into the building of the road or structure, and to that extent added to its value, therefore a lien for such labor and material should be given to him who does the one and furnishes the other. \* \* \*

While we may be compelled to follow the language of the statute, and give for the fuel furnished a lien, yet I think in the construction of these statutes we should start from the underlying thought of giving security to him who adds to the value of the road, and that we should never carry the statute beyond that, unless imperatively demanded by the language used.' The Wisconsin statute provides that every person who furnishes any materials in or about the erection, construction, protection, or removal of any machinery which is or becomes a part of the freehold, shall have a lien for such materials. In *Oil Co. v. Lane*, 75 Wis. 636 (44 N. W. Rep. 644; 7 L. R. A. 191), the court said: 'The statute seems to go on the principle that materials used and labor performed on machinery, which enhance its value and become a part of such machinery, should be entitled to a lien. This appears to be the object of the statute. It is clear that it is not everything used in operating machinery, and which tends to preserve it, that is embraced within the meaning of the statute. Many things serve to preserve machinery and make it operate more

efficiently and easily, which do not protect it in the sense of the statute.' We affirm the doctrine announced in these cases, as based upon correct principle."

**Sec. 497. Subcontractors and materialmen—Statutes construed.** Act. Cong., Aug. 13, 1894 (28 U. S. Stat. 278) construed and applied—bond by contractor with United States for construction and repair of any public building or work—right of subcontractor to sue on such bond. *United States v. Jack*, 124 Mich. 210 (82 N. W. Rep. 1049). To give materialmen a lien under Cal. Code Civ. Proc., § 1183, giving a lien to one who furnishes materials "to be used in the construction" of any building, etc., it is not enough that the materials in fact were used in the construction of the building, but they must have been furnished by the materialman expressly for the particular building on which the lien is asserted. *Weatherly v. Van Wyck*, 128 Cal. 329 (66 Pac. Rep. 846). Although a building contract is void, under Cal. Code Civ. Proc., §§ 1183, 1184, subcontractors and materialmen may have liens under it, and this right extends to employees of subcontractors. *Macomber v. Bigelow*, 126 Cal. 9 (58 Pac. Rep. 312). A notice under the statutes of California by a subcontractor or materialman of their claims to the landowner, operates as a complete garnishment as to any payments that may mature after it is given, but its effect upon payments that have matured before it is given, is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment is intercepted by the notice, but, if he has already assigned them to a third party, the notice will be inoperative to prevent their payment to such party; but in order for the contractor to defeat the effect of such notice by the assignment of any payment, his right to such payment must be complete. *Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585 (58 Pac. Rep. 187). Ill. Laws 1874, Mechanics' Lien Laws, §§ 29, 45 construed and applied—subcontractor's lien exceeding price named in contract with principal contractor—interest. *Mantonya v. Reilly*, 184 Ill. 183 (56 N. E. Rep. 425). Mass. Pub. Stat., ch. 16, § 64 construed and applied—right of materialmen to be paid out of funds due contractors for public improvements.



Nash v. Commonwealth, 174 Mass. 335 (54 N. E. Rep. 865). Mo. Rev. Stat. 1889, § 6705, giving a lien to every mechanic or other person, who shall do or perform any work or labor or furnish any material for the erection of any building upon land of another "under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor or subcontractor," does not give one who has contracted with a landowner to build a two-story house on his land power to create a lien on the land for materials furnished to erect a third story on the building in pursuance of a contract with a third person to whom the landowner has granted a right to build such third story. Badger Lumber Co. v. Stepp, 157 Mo. 366 (57 S. W. Rep. 1059). Mo. Rev. Stat. 1889, ch. 102, art. 4 construed and applied—lien against railroads for labor and material furnished in their construction—property subject to, and how lien may be enforced. Bethune v. Cleveland, St. L. & K. C. Ry. Co., 149 Mo. 587 (51 S. W. Rep. 465). Mont. Code Civ. Proc., § 2130, giving a lien for materials used in the construction of a building, does not give a lien for a cover for a stove pipe flue opening into the chimney from the interior of a house but removable at pleasure when the flue is to be used. Missouri Mercantile Co. v. O'Donnell, 24 Mont. 65 (60 Pac. Rep. 594). N. J. Gen. Stat., pp. 2073, 2074 construed and applied—effect of advance payments to contractor—notice to owner. Bayonne Bldg. Ass'n No. 2 v. Williams, 59 N. J. Eq. 617 (43 Atl. Rep. 669); Smith v. Dodge & Bliss Co., 59 N. J. Eq. 584 (44 Atl. Rep. 639); Person v. Herring, 53 N. J. L. 599 (44 Atl. Rep. 753). N. J. Gen. Stat., p. 2074 construed and applied—relative rights of holders of notices forbidding advance payments and materialmen accepting orders of contractors on owner. Bayonne Bldg. & L. Assn v. Williams, 57 N. J. Eq. 503 (42 Atl. Rep. 172). 2 N. J. Gen. Stat., pp. 2074, 2075 construed and applied—notice to owner—preference given to journeymen and laborers for wages. Donnelly v. Johnes, 58 N. J. Eq. 442 (44 Atl. Rep. 180); Flaherty v. Atlantic Lumber Co., 58 N. J. Eq. 467 (44 Atl. Rep. 186). N. J. Laws 1895, p. 313 construed and applied—priority given to liens of laborers and materialmen by their notice to landowner. Leary v. Lamont, N. J. Eq. (42 Atl. Rep. 97). Hill's Ann. Or. Laws, §

3678 construed and applied—payment to contractor before thirty days has expired from the completion of the structure—decree against owner in excess of contract price. *Watson v. Noonday Min. Co.*, 37 Or. 287 (60 Pac. Rep. 994). A materialman may enforce his right to a lien given him by Tex. Const., art. 16, § 37, only by complying with Tex. Rev. Stat., §§ 3296, 3308. *Berry v. McAdams*, 93 Tex. 431 (55 S. W. Rep. 1112). Where one furnishing material to a subcontractor to be used in the erection of a building, complies with Tex. Rev. Stat., § 3296 in regard to the giving of notice to the owner or his agent and filing an itemized account, he is entitled to a lien though the contractor owes nothing to the subcontractor. *Padgitt v. Dallas Brick & Const. Co.*, 92 Tex. 626 (50 S. W. Rep. 1010). A statute (Wis. Rev. Stat., §§ 3314, 3315), giving a lien for "work and labor" performed and "materials" furnished in constructing a well, does not give the owner of a well boring machine, the use of which was hired by a contractor in constructing a well, a lien for the hire thereof. *McAuliffe v. Jorgenson*, 107 Wis. 132 (82 N. W. Rep. 706). The giving of a notice to a land owner by a subcontractor or a material man which the statute (Wis. Rev. Stat., § 3315) requires to be "in writing" cannot be proved by parol testimony. *Rosholt v. Corlett*, 106 Wis. 474 (82 N. W. Rep. 305).

**Sec. 498. Subcontractors and materialmen—How far rights of are affected by payments to or contracts with the principal contractor.** A provision in a contract with a city by which it may retain a certain per cent. of the contract price to secure it against liens, is for the benefit of the city alone, and may be waived by it without increasing its liability to subcontractors or materialmen. *Iowa Brick Co. v. City of Des Moines*, 111 Ia. 272 (82 N. W. Rep. 922). Cal. Code Civ. Proc., § 1184 construed and applied—effect on subcontractor's and materialmen's lien of payment by the owner to the principal contractor before due. *Sweeney v. Meyer*, 124 Cal. 512 (57 Pac. Rep. 479). In Colorado it is held that the right of a subcontractor to file a lien is not defeated by a stipulation in the principal contractor's contract that he would not permit any lien to be set up by any subcontractor, or, if any should be set up, would cause

them to be satisfied of record. *Aste v. Wilson*, 14 Colo. App. 323 (59 Pac. Rep. 846). See opinion for exhaustive review of authorities. Pa. Pub. Laws 1895, p. 369 construed and applied—effect of principal's contract to defeat execution and recording. *Thomas Roberts Stephenson Co. v. Guenther*, 190 Pa. St. 628 (43 Atl. Rep. 129). Under Tex. Rev. Stat., § 3308, a materialman's lien cannot be enforced against the landowner to the extent he has made payments to the contractor "before he has received written notice of the existence of the debt" on account of which the materialman's lien is claimed. *Berry v. McAdams*, 93 Tex. 431 (55 S. W. Rep. 1112).

**Sec. 499. Lien claim by surety on contractor's bond stipulating against mechanics' liens.** When a contractor has given bond to the owner of the building he has contracted to erect, and one of the conditions of the bond is that the building shall be turned over to the owner with all lien claims "fully discharged, legally waived, or good and sufficient indemnity therefor" furnished to the owner, a surety upon the contractor's bond cannot himself maintain a bill in equity to enforce a lien against the building. *Moyes v. Kimball*, 92 Me. 231 (42 Atl. Rep. 400). The court refers to the cases of *German Lutheran Church v. Wehr*, 44 Md. 453; *Brewing Co. v. Donnelly*, 59 N. J. L. 48 (35 Atl. Rep. 647); and *Brewing Co. v. Clement*, 59 N. J. L. 438 (36 Atl. Rep. 883), as sustaining a contrary view; but, after commenting upon them, concludes its discussion by saying: "But dismissing these considerations as argumentative rather than decisive, we prefer to rest our decision upon the broader ground, that the sureties should be held to do precisely what they agreed to do, and that, having agreed that the building should be turned over to the owner free from liens, they are estopped from enforcing any. This would seem to be good law on general principles, without the citation of authorities. But we find the same view has been entertained by other courts. In a similar case in Pennsylvania it was said: 'If the plaintiff can recover upon a mechanic's lien against this building, the condition of the bond would be violated, and he would thereupon become bound, upon a breach of condition, to reimburse to the defendant whatever the defendant

was obliged to pay him as a mechanic's lien creditor. He voluntarily made himself surety for the original contractors that he would indemnify the defendant against all charges, claims, liens, mechanic's liens, or any incumbrance or debt in the nature of a lien or charge, of any kind whatsoever. This is not a mere undertaking not to file a lien, but a contract by this particular plaintiff that the building shall be delivered to the defendant free of all charges, claims, liens, etc. To perform this contract, there must be no debt, charge, or lien of any kind at the time of delivery. How, then, can the plaintiff have a lien himself without being bound to remove it just as much as if it were held by a stranger? But, if he is bound to remove it, he certainly cannot be permitted to enforce it. \* \* \* When the necessary legal effect of his contract as a surety is that he would be bound to discharge a lien in his own favor the moment it was obtained he must be held to have waived all right to file such a lien. *Rynd v. Pittsburg Natatorium*, 173 Pa. St. 237 (33 Atl. Rep. 1041). Again: 'It is inconsistent that one who guarantees that there shall be no lawful claim for work or materials furnished to the original contractor shall himself be permitted to occupy such a position. He cannot be permitted to recover without violating his contract of suretyship.' *Cannon v. Central Presbyterian Church*, 173 Pa. St. 242 (33 Atl. Rep. 1043). So, in Washington: 'It is clear to us,' the court said, 'from the face of the bond that it was the intention of all parties thereto that the owner of the building should thereby be secured from the enforcement of any liens against the property, or from being held liable on any account growing out of the contract with Jordan. This appearing from the face of the bond, it must be presumed that the sureties intended to bind themselves to that end when they signed it; and, the respondent Morse having been one of the sureties, he could not, in the face of his agreement to protect against liens under the contract, file and enforce one himself.' *Morse v. Mansfield*, 10 Wash. 373 (38 Pac. Rep. 1050).

'It would be inequitable to allow a person to enter into a solemn agreement to protect another from certain contingencies, and thereafter, while such agreement was in full force, to himself seek to enforce the special liability which he had obligated himself to protect against.' *Spears*

v. Lawrence, 10 Wash. 368 (38 Pac. Rep. 1049; 45 Am. St. Rep. 789).

"We think the reasoning in these cases is sound. We think it must be held that all the parties to the bond, principal and sureties, intended what they said,—that no liens should be enforced against the building. The sureties expressly so agreed with the owner, and such, we think, was their implied contract inter sese."

**Sec. 500. Joint lien on several lots or buildings.** A building under one roof partly located on two lots properly may be sold as a whole to satisfy a mechanic's lien decreed against it. *Mantonya v. Reilly*, 184 Ill. 183 (56 N. E. Rep. 425). Where the ends of two adjacent lots were fenced off and used as a building site, a house being placed upon one of them and a barn to be used in connection therewith on the other, one lien statement may be filed embracing material and labor furnished for both buildings. *Northwestern L. & Inv. Ass'n v. McPherson*, 23 Ind. App. 250 (54 N. E. Rep. 130). The right to a lien for machinery consisting of several parts forming one manufacturing plant under one roof is not affected by the fact that the different parts were located upon different platted lots, where the owner had obliterated the lot lines and by his use of the property had treated the whole as one lot and the parts as one plant. *Progress Press-Brick & Mach. Co. v. Gratiot Brick & Quarry Co.*, 151 Mo. 501 (52 S. W. Rep. 401; 74 Am. St. Rep. 557). Citing, *Meinholz v. Grodt*, 4 Mo. App. 568; *Kemper v. King*, 11 Mo. App. 116; *Wolfort v. City of St. Louis*, 115 Mo. 144 (21 S. W. Rep. 913); *Lindsay v. Gunning*, 59 Conn. 296 (22 Atl. Rep. 310; 11 L. R. A. 553); *Appeal of Lauman*, 8 Pa. St. 473; *Bodley v. Denmead*, 1 W. Va. 249; *Edwards v. Derrickson*, 28 N. J. Law, 39; *Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238 (27 Atl. Rep. 895); *Salt Lake Lithographing Co. v. Ibex Mine & Smelting Co.*, 15 Utah, 440 (49 Pac. Rep. 768; 62 Am. St. Rep. 944); *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614 (43 N. E. Rep. 876); *Hardware Co. v. McCarty*, 10 Colo. App. 200 (50 Pac. Rep. 744).

**Sec. 501. Priority of mechanics' liens—Statutes construed.** The excavation of a part of the basement of a build-

ing constitutes a "commencement" of its construction, so that mechanics' liens dependent upon its commencement attach. *Fitzgerald v. Walsh*, 107 Wis. 92 (82 N. W. Rep. 717). Citing, *Brooks v. Lester*, 36 Md. 65; *Insurance Co. v. Rowand*, 26 N. J. Eq. 389; *Thomas v. Mowers*, 27 Kan. 265; *Pennock v. Hoover*, 5 Rawle, 291; *Scott v. Goldinghorst*, 123 Ind. 268 (24 N. E. Rep. 333); *McCristal v. Cochran*, 147 Pa. St. 225 (23 Atl. Rep. 444). Persons performing labor for which they are entitled under the statute to enforce a mechanics' lien are "incumbrancers for value," within the meaning of Cal. Civ. Code, § 856, providing that "no implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of the real property for value, and without notice of the trust." *Chappius v. Blankman*, 128 Cal. 362 (60 Pac. Rep. 925). The priority of a mechanic's lien as against a recorded mortgage, under Cal. Code Civ. Proc., § 1186, dates from the commencement of the labor or furnishing of the material for a building on account of which it is claimed. *McClain v. Hutton*, 131 Cal. 132 (61 Pac. Rep. 273). The same is held in West Virginia, construing and applying Code, p. 652, § 2. *Cushwa v. Improvement Loan & Bldg. Ass'n*, 45 W. Va. 490 (32 S. E. Rep. 259). See dissenting opinion for exhaustive review of authorities. Under Ia. Laws, 23d Gen. Assem., ch. 48, debts owing to laborers by a corporation placed in the hands of a receiver have priority even over mechanic's liens filed against the property before the corporation acquired it. *Haw v. Burch*, 110 Ia. 234 (81 N. W. Rep. 460). Ky. Laws 1869, p. 562 construed and applied—mechanic's lien law for city of Louisville—priority as between vendors' and mechanics' liens. *Grainger v. Old Kentucky Paper Co.*, Ky. (49 S. W. Rep. 477; 20 Ky. Law Rep. 1491). Under Hill's Ann. Or. Stat., §§ 3671-3675, a lien attaches when work is begun or materials are furnished or placed on the premises and becomes effective on the filing of the claim or notice thereof in accordance with the statutes, when it relates back to the time it arose. *Henry v. Hand*, 36 Or. 492 (59 Pac. Rep. 330).

**Sec. 502. Priority as between mechanics' liens and mortgages.** The lien of an ordinary mortgage is not subordinated to a mechanic's lien merely because the money

which it was given to secure was loaned for the purpose of improving the mortgaged premises, and under an express contract that it should be so used. *Henry & Coatworth Co. v. Halter*, 58 Neb. 685 (79 N. W. Rep. 616). A recital in an agreement between one making a loan and taking a mortgage on the premises upon which buildings are to be erected and the contractors erecting such buildings, entered into for the purpose of giving the mortgage priority over mechanics' liens, to the effect that the money to be loaned "is to be used as a building and loan fund for the payment of said contractors," does not create a covenant or promise on the part of the mortgagee to pay the contractors out of such fund. *Monks v. Provident Inst. for Savings*, 64 N. J. L. 86 (44 Atl. Rep. 968). A vendor, who by his agreement has postponed the priority of his claim for purchase money to a mortgage for a certain sum which the vendee proposes to borrow from another to make improvements on the land, thereby bars himself from asserting priority of his claim as against persons claiming mechanics' liens for the erection of buildings on the premises at the instance of the grantee, to an amount equal to the proposed mortgage which was given priority by the agreement, although the vendee made the improvements without executing such mortgage and with the consent of the owner. *Ia. Laws*, 16th Gen. Assem., ch. 100, §§ 3, 10 construed and applied. *Jones v. Osborn*, 108 Ia. 409 (79 N. W. Rep. 143). Contractors who have performed labor and furnished materials in the erection of a manufacturing plant are not deprived of the statutory priority given to their mechanics' liens by mere knowledge of the fact that the owner of the property, a corporation, expects to put a first mortgage upon it to secure the payment of bonds sold by the corporation to raise money with which to make the improvements and put in operation the proposed enterprise, unless the proof show clearly an express agreement to this effect or circumstances brought home to the contractors requiring a man of ordinary prudence to understand that they took their contract under such terms. *Montgomery v. Allen*, Ky. (53 S. W. Rep. 813; 21 Ky. Law Rep. 1001). *Pepper & L. Pa. Dig.*, p. 3962, making void a mortgage by a quasi public corporation on its franchises and property as against contractors having liens thereon, does not make

such a mortgage void as against other persons. *Fidelity Tit. & T. Co. v. Schenley Park & H. Ry. Co.*, 189 Pa. St. 363 (42 Atl. Rep. 140; 69 Am. St. Rep. 815).

**Sec. 503. Priority of mechanics liens—Construction of statutes giving mechanics' liens priority as to buildings.** In Alabama a mechanic's lien is superior to the lien of a mortgagee as to the increased value of the property, due to improvements made by the lienor subsequent to the mortgage. *Christian-Craft Grocery Co. v. Kling*, 121 Ala. 292 (25 So. Rep. 629). The right of one making improvements consisting of an original building to have a lien thereon and to remove the same from the land, given by Mich. Laws 1891, No. 179, § 9, cannot be defeated by the fact that the building was erected on land constituting a homestead against which no lien could be asserted on account of the contract for the improvement being signed by the husband only. *Jossman v. Rice*, 121 Mich. 270 (80 N. W. Rep. 25; 80 Am. St. Rep. 493). The right of one entitled to a mechanic's lien on account of the construction of a building, under N. Dak. Comp. Laws, § 5480, to enforce his lien by a sale and removal of the building exists whether the property is subject to prior liens or not and may be enforced in the case of the erection of a building by one residing upon land upon which he had made a homestead filing, but had not made final proof thereof. *Mahon v. Surerus*, 9 N. Dak. 57 (81 N. W. Rep. 64). N. Dak. Rev. Codes, § 4795, giving a court authority under certain conditions to order real estate to be sold, and the proceeds to be divided between the mortgagee, who had the first lien upon the land, and a mechanic's lien holder, who had a first lien on the building, does not impair the obligations of the mortgage existing upon said land before the building was erected, and before the law was passed. *Craig v. Herzman*, 9 N. Dak. 140 (81 N. W. Rep. 288). Under Hill's Ann. Or. Laws, § 3671, a mechanic's lien attaches to a building or other improvements in preference to prior liens, mortgages or other incumbrances upon the land, whether such mechanic's lien is for the original construction or the alteration or repair of the building. *Cooper Mfg. Co. v. Delahunt*, 36 Or. 402 (60 Pac. Rep. 1).



**Sec. 504. Assignment of lien.** In Missouri it is held that a subcontractor who has furnished materials or performed work and labor may file his lien, and then assign the debt and lien account, and the assignee may prosecute the suit on the lien account to judgment in his own name. *Ittner v. Hughes*, 154 Mo. 55 (55 S. W. Rep. 267). An assignee of a mechanic's lien takes it subject to the same equities and defenses which exist against his assignor. *Goldman v. Brinton*, 90 Md. 259 (44 Atl. Rep. 1029).

**Sec. 505. Loss or waiver of lien.** A stipulation in a building contract providing that the contractors will not permit any liens to be set up by any subcontractors, or if any should be set up they would cause them to be satisfied of record, does not prevent the contractors themselves from filing a lien. *Aste v. Wilson*, 14 Colo. App. 323 (59 Pac. Rep. 846). Particular stipulations in a building contract held to prohibit the filing of liens either by the contractor or subcontractor. *Commonwealth Title-Ins. & T. Co. v. Ellis*, 192 Pa. St. 321 (43 Atl. Rep. 1034; 73 Am. St. Rep. 816). A person who files a lien on property for material furnished, and thereafter appears in an interpleader action brought to determine the priority of the rights of the creditors to the purchase price paid for the property on which the lien is claimed, and demands that his claim be paid out of said fund, waives such lien, and is estopped from foreclosing the same. *Idaho Gold Min. Co. v. Winchell, Ida.* (59 Pac. Rep. 533). The acceptance by one entitled to claim a mechanic's lien of negotiable notes for the amount of his account, which are not made payable after the time for bringing a suit to enforce such a lien, does not necessarily bar his right to have a lien. *Cushwa v. Improvement Loan & Bldg. Co.*, 45 W. Va. 490 (32 S. E. Rep. 259). A mechanic's lien is not waived by the claimant taking notes under an express agreement that they were not to affect his lien, but were executed simply as an accommodation to him, where, in an action to enforce the lien, he presents the notes to the court for cancellation. *McLean v. Wiley*, 176 Mass. 233 (57 N. E. Rep. 347).

**Sec. 506. Filing of lien statement.** Under Cal. Code Civ. Proc., § 1187, requiring a party claiming a mechanic's

lien to file a claim "for record with the county recorder of the county in which the property, or some part thereof, is situated," it is held that where a railroad lies in two counties the filing of a mechanic's lien against it in one county only is sufficient. *Bringham v. Knox*, 127 Cal. 40 (59 Pac. Rep. 198). Where premises upon which a lien is claimed are within the bounds of a new county formed from the territory of an existing county, the lien must be filed in the proper office of such new county, where opportunity to do so is available to the claimant before the expiration of the time given by the statute for filing. *Meehan v. Zeh*, 77 Minn. 63 (79 N. W. Rep. 655). Brick for constructing kilns and a press brick machine to be used for forming brick to be burned therein, all forming necessary parts of one whole plant, constructed at substantially the same time, under a common roof, the completion of all parts of which was necessary before the intended business could be carried on, will be regarded as having been furnished under a single contract; although they were not contracted for on the same day, where they were all furnished to the owner of the property within the statutory period before the lien was filed. *Progress Press-Brick & Mach. Co. v. Gratiot Brick & Quarry Co.*, 151 Mo. 501 (52 S. W. Rep. 401; 74 Am. St. Rep. 557).

**Sec. 507. Filing of lien statement—Effect of officer's failure to record.** The filing of a lien statement by a lien claimant within sixty days after his performance of work or furnishing material, as required by Horner's Ind. Rev. Stat., § 5295 (Burns' Rev. Stat. 1901, § 7257), preserves his lien and gives it priority from the time the work began or the materials were furnished, even against a recorded mortgage, whether the statement is recorded by the recorder, as required by § 5296 (Burns' Rev. Stat. 1901, § 7258), or not. *Northwestern L. & Inv. Ass'n v. McPherson*, 23 Ind. App. 250 (54 N. E. Rep. 130). The court say: "It is conceded by appellant's learned counsel that, under the decisions of the supreme court of this state, the filing of the notice secures the lien as between the owner and the lien claimant, but it is denied that the lien can be thus obtained as against an innocent third party for value. This precise question, so far as we are advised, has not been

passed upon in this state. The wording of the statutes of the various states upon the subject of mechanic's liens is dissimilar, and reported cases in which they are construed do not greatly aid us. It seems to us, however, as reasonable, that, when a mechanic or laborer does all that the statute requires him to do, he is entitled to whatever right the statute gives as against any one. He is required to file his notice for record with the recorder of the county; there his duty ends. Our supreme court has held that from that time the lien takes effect. We cite, in this connection, *Tousley v. Tousley*, 5 O. St. 78; *Insurance Co. v. Dake*, 87 N. Y. 257; *Bedford v. Tupper*, 30 Hun, 174; *Merrick v. Wallace*, 19 Ill. 486; *In re Wood's Appeal*, 82 Pa. St. 116; *In re Brooke's Appeal*, 64 Pa. St. 127."

**Sec. 508. Lien statement—Time for filing.** One seeking to enforce liens for materials furnished under several distinct contracts must file a lien statement in each case within the statutory limit after the furnishing of the last item under each contract. *Clark v. Boarman*, 89 Md. 428 (43 Atl. Rep. 926); *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685 (79 N. W. Rep. 616); *National Life Ins. Co. v. Ayres*, 111 Ia. 200 (82 N. W. Rep. 607). Where a contract is made to furnish specified materials to be used in the construction of a building, an implied understanding to furnish extras, if called for, may be inferred from the circumstances of the case; and in such a case the extras so furnished and the other material form one continuous account, and the time given for filing a lien statement begins to run from the date of the last item on the whole account. *Coughlan v. Longini*, 77 Minn. 514 (80 N. W. Rep. 695). Where the time given for filing a lien statement is enlarged by a new statute, the lien claimant whose time has not expired under the prior statute may claim the benefit of the new statute. *Montgomery v. Allen*, Ky. (53 S. W. Rep. 813; 21 Ky. Law Rep. 1001); *Fox v. Somerset Odd Fellows Hall & Auditorium Co.*, Ky. (54 S. W. Rep. 835; 21 Ky. Law Rep. 1272). Cal. Code Civ. Proc., § 1187 construed and applied—as to what constitutes the "completion" of a building in order to fix the time within which liens must be filed—presumption from occupancy. *Orlandi v. Gray*, 125 Cal. 372 (58 Pac. Rep. 15). Applying

Conn. Gen. Stat., § 3020, providing that a lien statement by one not the original contractor with the owner or a subcontractor acquiring rights with his consent must be filed within 60 days from the time he commenced to work, it is held that a certificate of lien filed in the name of both the original contractor and one with whom he had formed a partnership after the making of the contract but before the commencement of the work is of no validity. *Lapenta v. Lettieri*, 72 Conn. 377 (44 Atl. Rep. 730; 77 Am. St. Rep. 315). Mass. Pub. Stat., ch. 191, § 6 construed and applied—time allowed for filing. *Orne v. Barstow*, 175 Mass. 193 (55 N. E. Rep. 896). N. J. Pub. Laws 1896, p. 198 construed and applied—filing of lien statement within four months—extension of to items not furnished within that time. *Dowingtown Mfg. Co. v. Franklin Paper Mills*, 63 N. J. L. 32 (42 Atl. Rep. 765).

**Sec. 509. Lien statement—Designation of owner—Description of premises.** Construing Mont. Code Civ. Proc., § 2131, providing that a lien statement shall contain a just and true account of the amount due, after allowing all credits, and a correct description of the property to be charged, in connection with § 2132, requiring the county clerk to keep a record of lien statements filed which shall show the date of the filing, the amount thereof, the name of the person against whose property it is filed and a description of the property to be charged, it is held that a lien claim for materials furnished in the construction of a building which fails to state that the person for whom such materials were furnished was the owner or interested therein, is invalid. The name of the owner required by the statute to be mentioned in the claim, is the owner of the interest to be affected by or charged with the lien; and the mention of the record owner is not sufficient when the record owner is not the person for whose use or benefit the building is constructed. *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65 (60 Pac. Rep. 594); *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65 (60 Pac. Rep. 991). The term "bakery property" used in describing the property against which a lien is claimed properly may be held to include, not only those parts of the estate in which the process of baking is carried on or intended to be carried on, but also

those other parts which are used, or are intended to be used, for storage, distributing, or other purposes connected with that business. *York v. Barstow*, 175 Mass. 167 (55 N. E. Rep. 846). Under Mass. Pub. Stat., ch. 191, § 8, if, from the description given, the property intended to be covered by the lien can be reasonably recognized, a mere inaccuracy in the description will not invalidate the claim. *Pollock v. Morrison*, 176 Mass. 83 (57 N. E. Rep. 326). A lien statement by a subcontractor engaged in the construction of a railroad, filed under S. Dak. Comp. Laws, § 5470, need only describe that portion of the road on which he was employed. *Adams v. Grand Island & W. C. R. Co.*, 12 S. Dak. 424 (81 N. W. Rep. 960).

**Sec. 510. Lien statement—Formal requisites.** A statement in favor of a firm consisting of two persons signed by one of them and sworn to by the other is insufficient. *Smalley v. Bodinus*, 120 Mich. 363 (79 N. W. Rep. 567; 77 Am. St. Rep. 602). Cal. Code Civ. Proc., § 1183 construed and applied—sufficiency of lien statement against a railroad. *Brigham v. Knox*, 127 Cal. 40 (59 Pac. Rep. 198). Under Utah Rev. Stat., § 1386, a subcontractor is not required to state in his notice of intention to claim a mechanic's lien any of the terms or conditions of the contract between the owner and the original contractor. *Brubaker v. Bennett*, 19 Utah, 401 (57 Pac. Rep. 170). Utah Rev. Stat. 1898, § 1387 construed and applied—notice of lien for labor performed on mining claim—particularity of statement required. *Garner v. Van Patten*, 20 Utah, 342 (58 Pac. Rep. 684). See, on the same subject, *Culmer v. Caine*, 22 Utah, 216 (61 Pac. Rep. 1008). The verification of a lien statement required by Hill's Ann. Or. Laws, § 3673, may be made by the secretary of the corporation where a lien is filed by it. *Cooper Mfg. Co. v. Delahunt*, 36 Or. 402 (60 Pac. Rep. 1).

**Sec. 511. Lien statement—Mistakes and inaccuracies.** It is not material that the statement gives incorrectly the date of the first or last item or both, if no one thereby is misled to his prejudice, and the statement is filed properly within the statutory limit after the true date of the last item. *Coughlan v. Longini*, 77 Minn. 514 (80 N. W. Rep.

695). Ill. Rev. Stat. 1893, p. 930, § 4, requiring a lien statement to set forth "the time when such material was furnished or labor performed," is mandatory; and a false statement of the time is fatal. *May, Purington & B. Brick Co. v. General Engineering Co.*, 180 Ill. 535 (54 N. E. Rep. 638). A mistake in a lien statement as to the amount due made in the honest belief of its correctness will not render the statement void, although the statute (Hill's Ann. Or. Laws, § 3673) requires the claimant to file a true statement of his demand. *Cooper Mfg. Co. v. Deahunt*, 36 Or. 402 (60 Pac. Rep. 1). Under Utah Laws 1890, ch. 30, § 10, an incorrect statement of the amount due does not invalidate a lien statement unless made in bad faith. *Culmer v. Caine*, 22 Utah, 216 (61 Pac. Rep. 1008). Mass. Pub. Stat., ch. 191, § 6 construed and applied—inaccuracies which will not invalidate a statement. *Burrell v. Way*, 176 Mass. 164 (57 N. E. Rep. 335).

**Sec. 512. Enforcement of lien—Parties.** It is proper to make parties all persons having an interest in the property affected by the lien. *Christian-Craft Grocery Co. v. Kling*, 121 Ala. 292 (25 So. Rep. 629). The holder of a tax title to the property is a proper party. *Glos v. John O'Brien Lumber Co.*, 183 Ill. 211 (55 N. E. Rep. 712). A mechanic's lien may be enforced against one's equitable estate in lands without joining the legal owner as a defendant. *Carey Lombard Lum. Co. v. Bierbauer*, 76 Minn. 434 (79 N. W. Rep. 541). The husband of a married woman is a necessary party to a suit in equity, under Md. Code Pub. Laws, art. 63, § 25, to enforce a mechanic's lien against her property. *Clark v. Bowman*, 89 Md. 428 (43 Atl. Rep. 926).

**Sec. 513. Enforcement of lien—Defenses.** In New Jersey it is held that a builder sued under the mechanic's lien statute may not set off claims due to him in a different right. *Naylor v. Smith*, 63 N. J. L. 596 (44 Atl. Rep. 649). An answer alleging the failure of the plaintiff to deliver materials for which a lien is claimed at the time he agreed to do so, and that the materials afterward furnished were defective, on account of which the defendant suffered damage, is sufficient. *Rockwell Mfg. Co. v. Cambridge Springs Co.*, 191 Pa. St. 386 (43 Atl. Rep. 327). In an action by a

subcontractor to enforce a lien the landowner, by a cross bill to which the principal contractor and his sureties are made parties, cannot enforce a liability against them on their bond given to secure performance of the original contractor's contract. *McRae v. University of the South, Tenn.* (52 S. W. Rep. 463). The right of one to a mechanic's lien who has fully performed the obligation of an original contractor to erect a creamery plant, under an assignment of the contract, made with several persons who had subscribed funds to erect the same and agreed to form themselves into a corporation for the purpose of operating it, cannot be defeated on the ground that some of the subscriptions were forgeries or that one subscriber had been released from his subscription, after the association has accepted the plant and is operating it. *Haney & Campbell Mfg. Co. v. Adaza Co-Op. Creamery Co.*, 108 Ia. 313 (79 N. W. Rep. 79).

**Sec. 514. Enforcement of lien—Statute of limitations.**

In determining whether an action brought to enforce a mechanic's lien has been commenced within the time allowed by statute, the date of the summons and not the date of its service will be taken. *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590 (33 S. E. Rep. 342). Proceedings are commenced within one year from the filing of the lien statement so as to preserve the life of the lien, under Mich. Comp. Laws, §§ 10718, 10719, where, within that time, a bill is filed to enforce the lien although necessary persons are not made parties thereto until after the expiration of the year. *Casserly v. Waite*, 124 Mich. 157 (82 N. W. Rep. 841). The provisions of 1 Hill's Ann. Or. Laws, §§ 14, 15, 51, as to what constitutes the commencement of an action, apply only to the general statute of limitations, and do not govern a suit brought to foreclose a miner's lien; but such a suit is deemed commenced from the time of the filing of the complaint. Under 2 Hill's Ann. Or. Laws, p. 1906; Laws 1891, p. 76, in order to preserve a miner's lien an action to foreclose the same must be brought within six months after the filing thereof, and a provision in the general statute of limitations (1 Hill's Ann. Or. Laws, § 16), excepting from the period of limitation the time during which the defendant is absent from the state, has no appli-

cation to the running of the statute in such a case. *Burns v. White Swan Min. Co.*, 35 Or. 305 (57 Pac. Rep. 637). The court say: "In *Dunning v. Stovall*, 30 Ga. 444, a claim having been filed in pursuance of an act creating mechanics' liens, and providing that suits for their foreclosure should be commenced within one year, it was held that the time within which such suit should be commenced was not affected by a subsequent act providing that the statute of limitations should not begin to run against open accounts until the 1st of January of the year next following. In *Walker v. Burt*, 57 Ga. 20, which was a suit to foreclose a mechanic's lien, it was held that a general statute authorizing suits to be renewed within six months after their dismissal did not apply to suits to enforce mechanics' liens. In *Clark v. Manning*, 4 Ill. App. 649, it was held that the provision of the statute of limitations excepting from its operation persons who were out of the state applied only to actions provided for in the chapter relating to limitations, and had no application to suits under the mechanics' lien law. Limitations to the maintenance of actions were unknown at common law, but were adopted by courts of chancery to defeat a right which, in consequence of the laches of the party invoking the remedy, had become stale; and legislative assemblies, for the purpose of promoting the peace of society, have adopted, with certain exceptions, the rule of equity thus established. But this rule and the statute of limitations adopted in lieu thereof, were intended only to apply to common-law rights of action, and since a mechanic's lien was unknown at common law, and is a creature of statutory origin, the general statute of limitations can have no application to it."

**Sec. 515. Enforcement of lien—Personal judgment.** In Wisconsin it is held that a personal judgment should not be rendered against a defendant for the amount found to be due a contractor. *Laycock v. Parker*, 103 Wis. 161 (79 N. W. Rep. 327). Where, in an action to foreclose a mechanic's lien, jurisdiction of which the court acquired solely on the ground that it involved such foreclosure, it is found that no lien existed, the court is without jurisdiction to give a personal judgment in favor of the claimant for a less sum than the minimum amount of its jurisdiction



in actions to recover money; and the demands of several plaintiffs who join in such an action cannot be aggregated so as to give the court jurisdiction to render judgment, where each separate claim falls below the amount required to give the court jurisdiction, and there is no evidence of their having a joint interest. *Miller v. Carlisle*, 127 Cal. 327 (59 Pac. Rep. 785). Cal. Code Civ. Proc., § 1194 construed and applied—personal judgment for deficiency in foreclosure of lien on a mine. *Hines v. Miller*, 126 Cal. 683 (59 Pac. Rep. 142). Particular finding held insufficient to sustain a personal judgment against the owner for materials furnished to a third party as agent of the owner. *McClain v. Hutton*, 131 Cal. 132 (61 Pac. Rep. 273).

**Sec. 516. Enforcement of lien—Proof in the action.**

The agreed price at which materials are alleged to have been furnished is prima facie evidence of their value. *Brigham v. Knox*, 127 Cal. 40 (59 Pac. Rep. 198). Cal. Code Civ. Proc., § 1187, requiring the notice of a lien to contain a statement of the terms, time given, and conditions of the contract, require that such statements shall be true, and where a lien statement for materials furnished states that the claimant was to receive the reasonable market value of the materials and the uncontradicted evidence shows that the materials were furnished at a fixed price, the variance is fatal, and no lien can be acquired. *Wilson v. Nugent*, 125 Cal. 280 (57 Pac. Rep. 1008). When a lien notice is offered in evidence for the purpose of establishing a lien, all questions affecting its sufficiency should be raised at the time it is offered. *Greene v. Finnell*, 22 Wash. 186 (60 Pac. Rep. 144). Where the extent of a lot upon which a lien can be claimed is sought to be limited to a boundary line previously established by the owner erecting a fence including a part of the lot as originally laid out, with another lot, in connection with which such part has been improved, the owner may testify as to his intention in erecting the fence and making the improvements. *Pollock v. Morrison*, 176 Mass. 83 (57 N. E. Rep. 326). Where the lien statement filed describes the real estate upon which the buildings were erected as lots 94 and 95, in the town of Kewanna, proof that the materials for which the lien is claimed were furnished and the work done on

lots 94 and 95 in A. D. Toner's addition to the town of Kewanna, will not be held to be a variance, no one appearing to have been misled. *Northwestern L. & Inv. Ass'n v. McPherson*, 23 Ind. App. 250 (54 N. E. Rep. 130).

**Sec. 517. Enforcement of lien—Allowance of interest and attorney's fees—Constitutionality of statutes.** Interest from the date of the commencement of the action should be allowed a contractor on a sum found to be due him on foreclosure of a mechanic's lien which involved a settlement of a disputed claim for the value of extra work and of deductions for changes, omissions and delay. See opinion for exhaustive discussion of interest as an element of damages. *Laycock v. Parker*, 103 Wis. 161 (79 N. W. Rep. 327). Cal. Code Civ. Proc., § 1195 construed and applied—allowance of attorney's fees. *Williams v. Gaston*, 127 Cal. 641 (60 Pac. Rep. 427). Particular allowance of attorney's fees held not to be excessive. *Sweeney v. Meyer*, 124 Cal. 512 (57 Pac. Rep. 479). Attorney's fees allowed a successful lien claimant, under Fla. Laws 1887, ch. 3747, are incidental to the lien claim, and are entitled to payment on the same basis as the judgment for labor or material furnished. *Dell v. Marvin*, 41 Fla. 221 (26 So. Rep. 188; 79 Am. St. Rep. 171). Under Mont. Code Civ. Proc., § 1863, providing for the allowance of attorney's fees in an action to enforce a mechanic's lien, an allowance may be made for services rendered on an appeal in the action. *Hill v. Cassidy*, Mont. (60 Pac. Rep. 811). Fla. Laws 1887, ch. 3747, § 20, providing for the allowance of attorney's fees when the judgment shall be rendered in favor of the plaintiff is held constitutional. *Taylor C. J.* dissenting. *Dell v. Marvin*, 41 Fla. 221 (26 So. Rep. 188; 79 Am. St. Rep. 171; see pp. 178-186 for exhaustive collation of authorities on the "Constitutionality of statutes allowing an attorney's fee"). But Utah Rev. Stat., § 1400, providing for the recovery by the lien holder if successful of an attorney's fee, is held unconstitutional, as violating Const. art. 6, § 26, subd. 18, prohibiting the passage of a special law where a general law can be applicable, *Brubaker v. Bennett*, 19 Utah, 401 (57 Pac. Rep. 170); and Colo. Laws 1893, ch. 117, § 18, providing for the allowance to successful lien claimants of a reasonable attorney's fee in addition to costs otherwise allowed by the law, is held to be unconstitutional, as being in

violation of the provision in the Bill of Rights "that right and justice should be administered without sale, denial or delay." *Davidson v. Jennings*, 27 Colo. 187 (60 Pac. Rep. 354; 48 L. R. A. 340). The court say: "Counsel for appellants contend that the judgment and decree are erroneous, in that the lien decreed against the property of appellants includes, in addition to the principle and interest of the debt, and the usual costs, the allowance of attorney's fees to the respective lien claimants. These allowances were made in pursuance of § 18, ch. 117, p. 325, Sess. Laws 1893, which reads as follows: 'In all suits for the foreclosure of liens provided for in this act in which the plaintiff shall obtain a judgment and decree of foreclosure against the property described in said lien there shall be taxed as costs in addition to the costs already provided for in such cases, a reasonable sum as attorney fee to be fixed by the court at the time of rendering such judgment and decree.' It will be seen that this section imposes a penalty upon the defendant for exercising, in this class of cases, the common right of making a defense, which is accorded to every other litigant in the courts by subjecting him to the payment of the plaintiff's attorney's fees if he is successful, without giving him (the defendant) a reciprocal right if he is victorious. As furnishing support for this character of legislation, we are referred to the following cases, wherein statutes allowing an attorney's fee to plaintiff in actions against railroad companies for the killing of stock have been held to be constitutional: *Railway Co. v. Duggan*, 109 Ill. 537 (50 Am. Rep. 619); *Railway Co. v. Mower*, 16 Kan. 573; *Perkins v. Railway Co.*, 103 Mo. 52 (15 S. W. Rep. 320; 11 L. R. A. 426); *Railway Co. v. Dey*, 82 Ia. 312 (48 N. W. Rep. 98; 12 L. R. A. 436; 31 Am. St. Rep. 477). An examination of these cases discloses that the statutes there under consideration required the railroad company to fence its right of way, and provided penalties for the nonperformance of this statutory duty,—among them, an attorney's fee,—but no such reason underlies the legislation in question. The attorney's fee allowed by the foregoing provisions of our statute is not in the nature of a penalty for the violation of any statutory duty, but a punishment for the failure to pay the claim of the lienor, and cannot be sustained upon the principle announced in those cases. Its validity, therefore, depends upon whether it violates any provision of our constitution. Sec-

tion 6 of our bill of rights enacts 'that courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and that right and justice should be administered without sale, denial or delay.' In *Durkee v. City of Janesville*, 28 Wis. 464 (9 Am. Rep. 500), an act that exempted the city of Janesville from the payment of costs in any action brought against it to set aside any assessment or tax deed, or to prevent the collection of taxes in said city, was held to conflict with § 9, art. 1, of the constitution of Wisconsin, which was substantially like the foregoing section of our bill of rights. Chief Justice Dixon, in discussing the construction and effect to be given to that provision, said: 'It is obvious there can be no certain remedy in the laws, where the legislature may prescribe one rule for one suitor or class of suitors in the courts, and another for all others under like circumstances, or may discriminate between parties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination, they would be obliged to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision. Certainty of remedy implies uniformity of remedy and equality of rights and privileges in all things respecting it, which can only be obtained by general laws, equally binding upon every member of the community. The language denotes that there can be but one remedy for all similar cases, which must operate upon all persons or parties alike, and be equally free and favorable to all.' In *Railway Co. v. Morris*, 65 Ala. 193, a statute which imposed upon an unsuccessful appellant a reasonable attorney fee incurred by reason of taking an appeal from a decision rendered by a justice of the peace in a suit against railroad companies for damages to live stock, notwithstanding it gave the same right to both parties, was held to be in conflict with the fourteenth amendment to the constitution of the United States and section 14 of their bill of rights, which is identical with section 6 of ours. It is there said: 'The clear legal effect of these provisions is to place all persons, natural and corporate, as near as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state, except so far as

may be otherwise provided in the constitution. This right, though subject to legislative regulation, cannot be impaired or destroyed under the guise or device of being regulated. Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right, by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and the spirit of the foregoing constitutional provisions.' In *Railway Co. v. Moss*, 60 Miss. 641, a similar statute was adjudged unconstitutional, and the court saying: 'The right of appeal cannot be fettered and clogged with reference to parties litigant, or the attitude they occupy as plaintiff or defendant, all litigants whether plaintiff or defendant should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances.' In *Railway Co. v. Ellis*, 165 U. S. 150 (17 Sup. Ct. Rep. 255; 41 L. Ed. 666), and act of the legislature of Texas which provided that any person having a valid, bona fide claim for personal services or for damages, overcharges on freight, or claims for stock killed or injured by the trains of any railway company, that did not exceed \$50, might present the same for payment by filing it with the station agent of such corporation in any county where suit might be instituted, and if, after the expiration of thirty days after such presentation, such claim had not been paid or satisfied, he might immediately institute suit thereon in the proper court, and, if he should obtain judgment for the full amount of his claim, he should be entitled to recover the amount of such claim and all costs, and in addition thereto a reasonable attorney's fee, not to exceed \$10, to be assessed or awarded by the court or jury trying the issue, was held to be unconstitutional. Mr. Justice Brewer,

who delivered the opinion of the court, said: 'The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions, and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff. If it terminates in their favor they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right, and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.' And, after a thorough and exhaustive review of all the cases bearing upon the subject, he held the act to be unconstitutional because it operated to deprive the railway companies of property without due process of law, and denied to them the equal protection of the law, in that it singled them out, of all citizens and corporations, and required them to pay, in certain cases, attorney's fees to parties successfully suing them, while it gave to them no like or corresponding benefit. To the same effect are *Jolliffe v. Brown*, 14 Wash. 155 (44 Pac. Rep. 149; 53 Am. St. Rep. 868); *Coal Co. v. Rosser*, 53 O. St. 12 (41 N. E. Rep. 263; 29 L. R. A. 386; 53 Am. St. Rep. 622); *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188 (10 S. E. Rep. 288; 6 L. R. A. 359; 25 Am. St. Rep. 891); and others that might be cited. In but few of the states are statutes allowing attorney's fees in this class of cases to be found. In California such legislation has been upheld by the supreme court, but in none of the cases has its constitutionality been presented, discussed, or determined. In the following cases its constitutionality was directly challenged and passed upon: In *Chair Co. v. Runnels*, 77 Mich. 104 (43 N. W. Rep. 1006), a statute which allowed five dollars attorney's fees as a part of plaintiff's costs in a log-lien suit was held to be illegal and unauthorized, for the reasons stated in *Wilder v. Railway Co.*, 70 Mich. 382 (38 N. W. Rep. 289); *Schut v. Railway Co.*, 70 Mich. 433

(38 N. W. Rep. 291); *Lafferty v. Railway Co.*, 71 Mich. 35 (38 N. W. Rep. 660). In *Wilder v. Railway Co.*, 70 Mich. 382 (38 N. W. Rep. 289), the court, in discussing the question, says: 'This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist.' In *Randolph v. Supply Co.*, 106 Ala. 501 (17 So. Rep. 721), the provision allowing attorney's fees was held to be in violation of § 14 of their bill of rights, which, as above stated, is identical with § 6 of ours, 'in that it allows a fee to the plaintiff's attorney for prosecuting his suit successfully, whereas a like fee is not allowed the defendant's attorney in case the plaintiff fails in his suit, and on that account it is discriminative and class legislation.' In *Wortman v. Kleinschmidt*, 12 Mont. 316 (30 Pac. Rep. 280), the constitutionality of the act was upheld by a divided court, the majority opinion being delivered by Blake, C. J. But we think the able and dissenting opinion of De Witt, J., is better supported by reason and authority. In *Ivall v. Willis*, 17 Wash. 645 (50 Pac. Rep. 467), a logger's lien act, which provided an attorney's fee for the person claiming the lien, was upheld; the court observing that such act was clearly distinguishable from the statute under consideration in *Joliffe v. Brown*, 14 Wash. 155 (44 Pac. Rep. 149; 53 Am. St. Rep. 868), which provided for an attorney's fee to plaintiff in case of recovery against the railway for killing stock, and which was there declared unconstitutional because it did not provide for the payment of a like fee by plaintiff in case he should be unsuccessful, for the reason that the attorney's fee provided by the latter was compensation to plaintiff for expenditures necessarily made by him in the foreclosure of his lien, and allowable upon the same principle that costs are allowed. It is difficult to see how the designation of such fee as 'costs' obviates the objection that it confers upon the plaintiff a right that is denied to defendant, and that it is an 'attempt to grant special privileges and advantages to one class of litigants at the expense and to the detriment of another.' Appellees lay some stress upon the fact that Mr. Justice Brewer, in *Railway Co. v. Ellis*, 165 U. S. 150 (17 Sup. Ct. Rep. 255; 41 L.

Ed. 666), mentions, in the course of his discussion, that statutes giving special protection to laborers and mechanics have been upheld; but the reasons he gives for distinguishing the legislation here under consideration from such statutes apply with equal force to our act, to wit, that it does not aim to protect laborers and mechanics alone, but its benefits are conferred upon every individual, whether rich or poor, who has a claim of the character described. It extends the benefit to materialmen, contractors, and others who do not come within the reason that justifies such legislation for the protection of laborers or mechanics. While it is true that statutes extending the right to a lien to these other classes have been upheld, yet the principle upon which they have been sustained affords no support for extending to them the benefits of the provision under consideration. We are unable to perceive any reason why, in an action to enforce their claims for merchandise or material furnished in the erection of a house or for the development of a mining claim, they should be afforded any other or greater rights than are given other merchants who furnish provisions or supplies to persons for family consumption, or that their debtors should not have the same right to contest the justice of their claims upon the same terms and conditions as are afforded to other debtors by the general law of the land. It is no answer to say that the debtor may avoid the imposition of this additional cost by paying his honest debts, because the very purpose of the litigation he invokes is to determine whether he owes the debt or not. And it is immaterial whether he successfully defeats the larger part of the claim. He may nevertheless be mulcted in a sum which will deprive him of any benefit from the defense which he has legitimately established. It is also equally immaterial whether he interposes a vexatious defense, or makes an honest though unsuccessful one, or allows judgment to be taken against him by default; he is subject to the same penalty. We think this character of legislation is prohibited by § 6 of our bill of rights, and that both upon principle and authority § 18 of the lien law is unconstitutional, and that the court below erred in allowing the attorney's fees complained of."

**Sec. 518. Enforcement of lien—Miscellaneous notes.**  
The existence of a debt is a prerequisite to the enforcement



of a mechanic's lien, and no judgment can be rendered to enforce such a lien until the debtor is made a party to the proceedings and the fact and amount of his liability are judicially ascertained. *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65 (60 Pac. Rep. 594); *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65 (60 Pac. Rep. 991). In the first case the court cite, *Gilliam v. Black*, 16 Mont. 217 (40 Pac. Rep. 303); *Kerns v. Flynn*, 51 Mich. 573 (17 N. W. Rep. 62); *Vreeland v. Ellsworth*, 71 Ia. 347 (32 N. W. Rep. 374; *Lookout Lum. Co. v. Mansion Hotel & B. Ry. Co.*, 109 N. C. 658 (14 S. E. Rep. 35); *Sinnickson v. Lynch*, 25 N. J. L. 317; *Estey v. Lumber Co.*, 4 Colo. App. 165 (34 Pac. Rep. 1113). A judgment by agreement in an action to enforce a mechanic's lien is as conclusive as if rendered upon a trial of the cause. *Lemmon v. Osborn*, 153 Ind. 172 (54 N. E. Rep. 1058). A decree foreclosing a mechanic's lien properly cannot adjudge null and void a tax deed, concerning which no averment is made in the complaint. *Glos v. John O'Brien Lumber Co.*, 183 Ill. 211 (55 N. E. Rep. 712). Objections to a mechanic's lien statement on account of defects in the description of the property which could have been remedied by amendment, under Bal. Ann. Wash. Codes & Stat., § 5904, will not be heard for the first time on appeal. *Olson v. Snake River Val. R. Co.*, 22 Wash. 139 (60 Pac. Rep. 156). The owner of real estate to be affected by the foreclosure of a mechanic's lien, although not a party to the action, who appears on the trial of the case, demurs to the plaintiff's action, and pleads to the merits thereof, is bound by the judgment rendered therein. *Benson v. Shines*, 107 Ga. 406 (33 S. E. Rep. 439). Cal. Code Civ. Proc., § 1195 construed and applied—joinder of several claimants in one action. *Miller v. Carlisle*, 127 Cal. 327 (59 Pac. Rep. 785). *Horner's Ind. Rev. Stat.*, § 5299 (*Burns' Rev. Stat.* 1901, § 7260), authorizing the consolidation of actions by different lien claimants and providing that all lien claimants may be made parties, does not permit the joinder as plaintiffs of claimants having several interests. *Northwestern L. & Inv. Ass'n v. McPherson*, 23 Ind. App. 250 (54 N. E. Rep. 130). *Mass Pub. Stat.*, ch. 191, § 20 construed and applied—amendment of petition. *Burrell v. Way*, 176 Mass. 164 (57 N. E. Rep. 335).

# MINES

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## EPITOME OF CASES.

**Sec. 519. Right to pump natural gas or oil from well**  
**—Nature of property in natural gas.** A gas pump lawfully may be used to increase the production of an oil well although the production of wells on adjoining land thereby is diminished. *Jones v. Forest Oil Co.*, 194 Pa. St. 379 (44 Atl. Rep. 1074; 48 L. R. A. 748). But the supreme court of Indiana, in an exhaustive opinion upholding the constitutionality of statutes prohibiting the use of artificial means to increase the natural flow of gas from a well, hold that the pumping of natural gas, or the use of other artificial devices to increase its flow, from a continuous, connected, and limited reservoir in the earth, to the damage of other proprietors who have wells supplied from such common reservoir, is an unlawful injury to the common rights of the latter, independently of any statute on the subject. *Manufacturers' Gas & Oil Co. v. Indiana Nat. Gas & Oil Co.*, 155 Ind. 461 (57 N. E. Rep. 912; 50 L. R. A. 768). The court say: "Natural gas is a fluid mineral substance, subterranean in its origin and location, possessing in a restricted degree the properties of underground waters, and resembling water in some of its habits. Unlike water, it is not generally distributed, and, so far as now understood, it can be used for but few purposes; the most important being that of fuel. Its physical occurrence is in limited quantities only, within circumscribed areas of greater or less extent. If it could be dealt with as subterranean waters, there would be but little difficulty in determining the rules by which the rights of landowners and other persons interested in it should be governed. But the difference between natural gas and underground waters, whether flowing in channels or percolating the earth, is so marked that the principles which the courts apply to questions relating to the latter are not adapted to the adjustment of difficulties arising from conflicting interests in this new and peculiar fluid. Natural gas, being confined within limited territorial areas,

and being accessible only by means of wells or openings upon the lands underneath which it exists, is not the subject of public rights in the same sense or to the same extent as animals *ferae naturae* and the like are said to be. Without the consent of the owner of the land, the public cannot appropriate it, use it or enjoy any benefit whatever from it. This power of the owner of the land to exclude the public from its use and enjoyment plainly distinguishes it from all other things with which it has been compared, in the use, enjoyment, and control of which the public has the right to participate, and tends to impress upon it, even when in the ground in its natural state (at least, in a qualified degree), one of the characteristics or attributes of private property. In the case of animals *ferae naturae*, fish, and the like, this public interest is said to be represented by the sovereign or state. So, in the case of navigable rivers and public highways, the state, in behalf of the public, has the right to protect them from injury, misuse, or destruction. But in the case of natural gas there are reasons why the right to protect it from entire destruction while in the ground should be exercised by the owners of the land who are interested in the common reservoir. From the necessity of the case, this right ought to reside somewhere, and we are of the opinion that it is held, and may be exercised, by the owners of the land, as well as by the state. Natural gas in the ground is so far the subject of property rights in the owners of the superincumbent lands, that while each of them has the right to bore or mine for it on his own land, and to use such portion of it as, when left to the natural laws of flowage, may rise in the wells of such owner and into his pipes, no one of the owners of such lands has the right, without the consent of all the other owners, to induce an unnatural flow into or through his own wells, or to do any act with reference to the common reservoir, and the body of gas therein, injurious to, or calculated to destroy, it. In the case of lakes or flowing streams, it cannot be said that any particular part or quantity or proportion of the water in them belongs to any particular land or riparian owner; each having an equal right to take what reasonable quantity he will for his own use. But the limitation is upon the manner of taking. So, in the case of natural gas, the manner of taking must be reasonable, and not injurious to or destructive of the common source from which the gas is drawn. The right of each

owner to take the gas from the common reservoir is recognized by the law, but this right is rendered valueless if one well owner may so exercise his right as to destroy the reservoir, or to change its condition in such manner that the gas will no longer exist there. \* \* \* The surface proprietors have the right to reduce to possession the gas found beneath. They could not be absolutely deprived of this right without a taking of private property. But there is a co-equal right in all of such owners to take the gas from the common source of supply. The use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right, to the detriment of others. From these considerations, the supreme court of the United States held that the legislature derived the power to protect all the collective owners, by securing a joint distribution, to arise from the enjoyment by them of their privilege to reduce to possession. It declares the act of 1893 to be a statute protecting private property, and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. A right of property in all the surface owners in the gas contained in the common reservoir of supply is recognized, as is also the constitutional legislative authority to protect the right of property from destruction. The final conclusion of the court is that one common owner of the gas in the common reservoir cannot divest all the others of their rights, without wrongdoing. The acts of 1891 and 1893 are an express recognition by the legislature of the qualified ownership of the common owners in the gas in the common reservoir, and any act therein forbidden may be the subject of a suit at law or a proceeding in equity by the person injured, as well as the foundation of a public prosecution. Independently, however, of any statute, for the reason already stated, the common owners of the gas in the common reservoir, separately or together, have the right to enjoin any and all acts of another owner which will materially injure, or which will involve the destruction of, the property in the common fund, or supply of gas. Acts 1893, p. 300 (Burns' Rev. Stat. 1901, §§ 7510-7514); *State v. Ohio Oil Co.*, 150 Ind. 21 (49 N. E. Rep. 809; 47 L. R. A. 627); *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 171 U. S. 60 (18 Sup. Ct. Rep. 895; 43 L. Ed. 72); *Brown v. Spilman*, 155 U. S. 665 (15

Sup. Ct. Rep. 245; 39 L. Ed. 304); *Jamieson v. Oil Co.*, 128 Ind. 555 (28 N. E. Rep. 76; 12 L. R. A. 652); *Townsend v. State*, 147 Ind. 624 (47 N. E. Rep. 19; 37 L. R. A. 294; 62 Am. St. Rep. 477); Acts 1891, p. 89; *Hibberd v. Slack*, (C. C.) 84 Fed. Rep. 579."

**Sec. 520. Mining partnerships.** In discussing the subject of mining partnerships, the supreme court of West Virginia, in the case of *Childers v. Neeley*, 47 W. Va. 70 (34 S. E. Rep. 828; 49 L. R. A. 468), say: "In two leases of town lots for oil and gas purposes, Childers owned a one-fourth interest; Ramey, a three-eighths interest; Neeley, a three-eighths interest. They were so far joint tenants. They agreed to develop the lots for oil, but made no written articles of partnership—in fact, no oral express formation of a partnership. They simply by an indefinite understanding, agreed to develop their common property, each giving his skill, paying his share of outlay proportionate to his ownership, and getting his share of the product proportionate to such ownership. I use the word 'product' instead of 'profits,' because there was no contract explicit on this point to distinguish product from profit. 'Partnership must be distinguished from joint management of property owned in common. Where two partners own a chattel, and make a profit by the use of it, they are not partners, without some special agreement which makes them so.' T. Pars. Partn. § 76. Two heirs or other co-owners of a farm, jointly farming it for profit, are not partners. There is a peculiar partnership, called a 'mining partnership,' partaking partly of the nature of an ordinary trading or general partnership, on the one hand, and partly of a tenancy in common, on the other. It is an important question to those engaged in the oil and other mining business whether each one is jointly and severally liable for all the doings of every or any other of the associates in the venture, as in ordinary trading partnerships. What is a mining partnership? 15 Am. & Eng. Enc. Law, p. 609, says: 'When tenants in common of a mine unite and co-operate in working it, they constitute a mining partnership.' Many of the authorities there cited thus define it. See the California case of *Skillman v. Lachman*, 23 Cal. 198 (83 Am. Dec. 96), and note discussing it fully; *Lamar's Ex'r v. Hale*, 79 Va. 147. Mere coworking makes them partners, without special contract. *Barring & A.*

Mines & M. Courts of equity take jurisdiction of them as if general partnerships. 2 Colly. Partn., ch. 35. Of course, owners of mines, oil leases, or farms can by agreement make an ordinary partnership therein; but 'where tenant in common of mines or oil leases or lands actually engaged in working the same, and share, according the interest of each, the profit and loss, the partnership relation subsists between them, though there is no express agreement between them to be partners or to share profits and loss.' *Duryea v. Burt*, 28 Cal. 569. The presumption in such case would be that of a mining partnership, rather than an ordinary one, in absence of an express agreement forming an ordinary general partnership. Perhaps the case of *Bank v. Osborne*, 159 Pa. St. 10 (28 Atl. Rep. 163; 39 Am. St. Rep. 665), and other cases in that state cited in *Bryan, Petroleum & Natural Gas*, 283, would justify the inference that the parties operated as tenants in common; but the current of authority elsewhere recognizes the inference of mining partnerships. That state does not recognize such a partnership. Justice Field said in *Kahn v. Smelting Co.*, 102 U. S. 645 (26 L. Ed. 266): 'Mining partnerships, as distinct associations, with different rights and liabilities attaching to members of ordinary partnerships, exist in all mining communities. Indeed, without them, successful mining would be attended with difficulties and embarrassments much greater than at present.' One leading distinction between the mining partnership and the general one is that the general one has, as a material element of its membership, the *delectus personae* (choice of persons), while the other has not. Those forming an ordinary partnership select the persons to form it, always from fitness, worthiness of personal confidence; but we know such is not always or often the case in oil ventures. It is because of this *delectus personae* that the law gives such wide authority of one member to bind another by contracts, by notes, and otherwise. One is the chosen agent of the other. Hence, when one member dies or is bankrupt, or sells his interest to a stranger, even to an associate, the partnership is closed, one chosen member is gone, the union broken; because he may have been the chief dependence for success, and the newcomer may be an unacceptable person, who would entail failure upon the firm. In the mining partnership those occurrences make no dissolution, but the others go on; and, in case a stranger has bought the

interest of a member, the stranger takes the place of him who sold his interest, and cannot be excluded. If death, insolvency, or sale were to close up vast mining enterprises, in which many persons and large interests participate, it would entail disastrous consequences. From the absence of this *delectus personae* in mining companies flows another result, distinguishing them from the common partnership, and that is a more limited authority in the individual member to bind the others to pecuniary liability. He cannot borrow money or execute notes or accept bills of exchange binding the partnership or its members, unless it is shown that he had authority; nor can a general superintendent or manager. They can only bind the partnership for such things as are necessary in the transaction of the particular business, and are usual in such business. *Charles v. Eshleman*, 5 Colo. 107; *Skillman v. Lachman*, 23 Cal. 198 (83 Am. Dec. 96, and note); *McConnell v. Denver*, 35 Cal. 365 (95 Am. Dec. 107); *Jones v. Clark*, 42 Cal. 181; *Manville v. Parks*, 7 Colo. 128 (2 Pac. Rep. 212); *Congdon v. Olds*, 18 Mont. 487 (46 Pac. Rep. 261); *Judge v. Braswell*, 13 Bush. 67 (26 Am. Rep. 185); *Waldron v. Hughes*, 44 W. Va. 126 (29 S. E. Rep. 505). In fact, it is a rule that a nontrading partnership, as distinguished from a trading commercial firm, does not confer the same authority by implication on its members to bind the firm; as, e. g. a partnership to run a theatre or other single enterprise only. *Pease v. Cole*, 53 Conn. 53 (22 Atl. Rep. 681); *Deardorf's Adm'r v. Thacher*, 78 Mo. 128 (47 Am. Rep. 95); *Smith*, Merc. Law, 82; T. Pars. Partn. § 85; *Pooley v. Whitmore*, 57 Tenn. 629 (27 Am. Rep. 733). A mining partnership is a nontrading partnership, and its members are limited to expenditures necessary and usual in the particular business. *Bates*, Partn. § 329. Members of a mining partnership, holding the major portion of property, have power to do what may be necessary and proper for carrying on the business, and control the work, in case all cannot agree, provided the exercise of such power is necessary and proper for carrying on the enterprise for the benefit of all concerned. *Dougherty v. Creary*, 30 Cal. 290 (89 Am. Dec. 116)." For particular cases on mining partnerships, see *Ferris v. Baker*, 127 Cal. 520 (59 Pac. Rep. 937); *Prince v. Lamb*, 128 Cal. 120 (60 Pac. Rep. 689).

**Sec. 521. Mining leases.** A lease of an undivided one-third interest in a mining claim, and not a mere license, is made by an instrument by which the party of the first part "hereby leases" such interest from date for a period of one year, while the party of the second part "agrees to work said mine in a workmanlike manner and leave the same in as good condition as it is at this time," and to pay royalty for all ores taken therefrom. *Paul v. Cragnas*, 25 Nev. 293 (59 Pac. Rep. 857; 47 L. R. A. 540). N. Y. Const. 1846, art. 1, § 14; Rev. Const., art. 1, § 13, prohibiting leases of agricultural lands for a longer term than twelve years, does not invalidate a twenty-year lease of agricultural lands for mining purposes, where the lessee covenants not to use the premises for any other purpose, and the lessor is given the right to use them for agricultural purposes so far as he can do so without interfering with the mining operations. *Massachusetts Nat. Bank v. Shinn*, 163 N. Y. 360 (57 N. E. Rep. 611). In an action to recover substantial damages for the failure of a lessee to operate under a coal mining lease providing for the payment of royalty to the lessor, the latter not only must show that merchantable coal existed on the land, but that it could be mined with profit, after deducting the royalty. *Colorado Fuel & Iron Co. v. Pryor*, 25 Colo. 540 (57 Pac. Rep. 51).

**Sec. 522. Mining leases—Construction—Forfeiture—Abandonment.** A stipulation in a lease of a coal mine and improvements which was exclusive of appliances for removing coal, that any improvements made by the lessees were to remain at the expiration of the lease, does not prevent their removing a hauling system introduced by them instead of other appliances for removing coal. *Beech Creek Coal & Coke Co. v. Mitchell*, 193 Pa. St. 112 (44 Atl. Rep. 245). For construction of particular grant of gas, oil and minerals, see *Brooks v. Kunkle*, 24 Ind. App. 624 (57 N. E. Rep. 260). For construction of particular coal mining leases, see *Genet v. President, etc., of Delaware & H. Canal Co.*, 163 N. Y. 173 (57 N. E. Rep. 297); *Hardin v. Thompson*, Ky. (57 S. W. Rep. 12); *Colorado Fuel & Iron Co. v. Pryor*, 25 Colo. 540 (57 Pac. Rep. 51). Where a mining lease gave the lessee the right to abandon the lands and mining at any time and remove all his buildings and fixtures, the lessor cannot acquire title to such fixtures by declaring a forfeiture of the



lease for nonpayment of rent. *Wick v. Bredin*, 189 Pa. St. 83 (42 Atl. Rep. 17).

**Sec. 523. Oil and gas leases.** In Indiana it is held that when possession is taken under an oil and gas lease providing for the payment of an annual rent, but which does not contain any definite stipulation as to its termination, a tenancy from year to year is created, under Rev. Stat. 1894, § 7089 (Rev. Stat. 1901, § 7089), which may be terminated at the end of any year. *Diamond Plate-Glass Co. v. Echelbarger*, 24 Ind. App. 124 (55 N. E. Rep. 233). Ohio Rev. Stat., § 4112a construed and applied—recording of oil and gas leases. *Northwestern Ohio Nat. Gas Co. v. City of Tiffin*, 59 O. St. 420 (54 N. E. Rep. 77). A covenant by a lessee's assignee of an oil lease to pay an additional sum if oil is found on the premises, does not run with the land so as to bind a second assignee. *Fisher v. Guffey*, 193 Pa. St. 393 (44 Atl. Rep. 452). Where an oil lease provides for the sinking of a test well and stipulates what shall be done if it produces oil in paying quantities, but makes no provision as to what shall be done if the well prove to be dry, in the case of the happening of the latter there is an implied obligation on the lessee to proceed with the exploration and development of the land with reasonable diligence, according to the usual course of the business, and a failure to do so amounts to an abandonment which will sustain a re-entry by the lessor. *Aye v. Philadelphia Co.*, 193 Pa. St. 451 (44 Atl. Rep. 555; 74 Am. St. Rep. 697). A lessor in a gas lease providing for the drilling and operating of a gas well upon the premises and a payment by the lessee of a stipulated annual rent from the date of the drilling of the well until it was no longer profitable, upon abandonment of the well during a current rental year, is entitled to recover only a ratable part of the rent for the year in which the well was abandoned, and he cannot recover rent after such abandonment. *Henley, J., dissenting. Moon v. Pittsburg Plate-Glass Co.*, 24 Ind. App. 34 (56 N. E. Rep. 108). A lease of land, in consideration of a certain portion of the oil, for operating for oil for a term of ten years "and as long thereafter as oil \* \* \* is found in paying quantities," may be terminated by either party at any time, when, after the expiration of the ten years, the lessee fails to produce oil in paying quantities, and his rights under the lease are not re-

newed by a subsequent discovery of oil in paying quantities. *Cassell v. Crothers*, 193 Pa. St. 359 (44 Atl. Rep. 446). The principle of this case is supported by *Northwestern Ohio Nat. Gas Co. v. City of Tiffin*, 59 O. St. 420 (54 N. E. Rep. 77). In an action for rent on an oil lease in which the lessee agrees to pay rent if a well is not drilled within a specified time, proof by the lessor of the lessee's failure to drill the well is necessary to entitle him to recover. *Mississinewa Min. Co. v. Andrews*, 22 Ind. App. 523 (54 N. E. Rep. 146). An executory gas and oil lease, which provides for its surrender at any time, without payment of rent or fulfillment of any of its covenants on the part of the lessee, creates a mere right of entry at will, which may be terminated by the lessor at any time before it is executed by the lessee; and the execution of a new lease to other lessees, and possession thereunder, render such prior executory lease invalid. *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84 (34 S. E. Rep. 923). Such a lease is invalid to create any estate other than the mere optional right of entry, which is subject to termination at the will of either party; and the lease is terminated by the death of the lessor. *Trees v. Eclipse Oil Co.*, 47 W. Va. 107 (34 S. E. Rep. 933).

**Sec. 524. Miscellaneous notes.** The surface of mineral lands may be owned by one person, and the mineral beneath by another, each with an indefeasible title; and, when so owned, they constitute separate corporeal hereditaments, with all the incidents of separate ownership, and the surface land may be partitioned the same as where there is no mineral under it. *Smith v. Jones*, Utah, (60 Pac. Rep. 1104). A purchaser of the coal lying under a certain tract of land, to whom is granted a right of way into, upon, and under the land, at such points and in such manner as might be necessary for the purpose of mining the coal, so long as the mine under such land is necessarily kept open, may use its gangways for the purpose of removing the coal mined under an adjoining tract of land owned by him. *Webber v. Vogel*, 189 Pa. St. 156 (42 Atl. Rep. 4). For particular conveyance of premises to be occupied and used for working and operating a mining claim held to create a license and not to pass title to the premises, see *Baker v. Clark*, 128 Cal. 181 (60 Pac. Rep. 677).

# MORTGAGES

STATE v. SUPERIOR COURT.

(21 Wash. 469.)

**Writ of assistance—Right of purchaser at foreclosure sale.** A writ of assistance will not be allowed a purchaser at a foreclosure sale to dispossess a lessee of the mortgagor whose rights attached prior to the sale under which such purchaser claims title, and who was not made a party to the proceedings from which the sale resulted.

DUNBAR J.

**Sec. 525. Statement of the case.** On June 23, 1898, Anne J. Grattan commenced action in the superior court of Thurston county, Washington, to foreclose a real-estate mortgage executed by Robert Wiggins and wife. Such proceedings were had in said action that in November, 1898, a decree was had foreclosing said mortgage, and directing sale of the premises therein described. After sale and confirmation, plaintiff filed in said cause her petition for writ of assistance, praying that said writ issue to eject and remove said mortgagors and one William Hartman, relator therein, who, as petitioner claimed, had come into possession pendente lite. Upon the return day the relator, Hartman, appeared, and moved the court to revoke and discharge the order as to him, on the ground that he had taken possession of said premises under a written lease from Wiggins and wife prior to the commencement of said foreclosure suit, was in possession of said premises, and the whole thereof, at the date when said foreclosure suit was begun, and had been ever since, and was then, in possession of said premises; that he had at great expense put crops on said premises during the year 1899, and that during all the months since the date of sale, and until on or about the first day of May, 1899, no one questioned his right of possession of said premises; that he was not a party plaintiff or defendant in or to the said foreclosure proceedings, and did not know until on or about the 1st day of May,

1899, that the plaintiff, Anne J. Grattan, claimed any right to the possession of said premises. The motion was denied, and an application for a writ of prohibition is applied for here.

**Sec. 526. Writ of assistance—Purpose of and when issued.** The writ of assistance is of ancient origin. Its purpose always has been to place in possession parties who have obtained judicial title to real estate; and it is strenuously insisted by the respondents here that, if the writ could not issue in cases of this kind, it would have no office, and would virtually drop out of existence. Many cases are cited to sustain the issuing of the writ, but on examination we are unable to see that they touch the point involved. The objection here is that the court has no jurisdiction to try the question raised by the relator, viz., that his right to the possession of this land was acquired prior to the commencement of the foreclosure proceedings. The writ of assistance can issue only to the parties to the prior action, or those claiming under them pendente lite, and this is all that is decided by any or all of the cases cited by the respondents. They are mostly meager decisions. The most voluminous and vigorous probably is *Schenck v. Conover*, 13 N. J. Eq. 220 (78 Am. Dec. 95). In reviewing the cases on this question, the court in that case cites the following language from Chancellor Kent in *Kershaw v. Thompson*, 4 Johns. Ch. 609: "The distribution of power among the courts would be injudicious, and the administration of justice exceedingly defective, and chargeable with much useless delay and expense, if it were necessary to resort, in the first instance, to a court of equity, and afterwards to a court of law, to obtain a perfect foreclosure of a mortgage. It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy, viz., the foreclosure and possession of the forfeited pledge. But this does not, upon due examination, appear to be the case; and it may be safely laid down as a general rule that the power to apply the remedy is co-extensive with the jurisdiction over the subject-matter. A bill to foreclose the equity of redemption is a suit concerning realty, and in rem, and the power that can dispose of the fee must control the possession." But it will be noticed that the learned chancellor did not go to the extent claimed for the writ by the respondents, and evidently recognized the fact that its true office was

to summarily carry into execution judgments against parties to the action who will frequently refuse to remove from the premises after judgment of foreclosure has been obtained. It is the inconsistency of holding that another action must be brought against those parties against which the learned chancellor was inveighing, for he proceeds to say: "The parties to the suit are bound by the decree; their interests and rights are concluded by it; and it would be very unfit and unreasonable that the defendant, whose right and title has been passed upon and foreclosed by the decree, should be able to retain the possession in despite of the court. This is not the doctrine of the cases, not the policy of the law." Neither is there any questioning the announcement quoted in respondents' brief from Jones, *Mortgages* (5th Ed.) § 1664, to the effect that "possession will be given to the purchaser not only as against all the parties to the suit, but also as against any persons who have come into possession under them pending the suit." The very object of the writ is to enforce rights which have already been judicially determined, partaking somewhat of the nature of an execution. But there is no claim here that the relator's rights have been determined. He was not a party to the foreclosure proceedings, and his allegation is that his rights attached prior to such proceedings. It is true this is denied by the answer, but that issue can be raised only after regular process with due time is given, and when so raised upon that issue the relator is entitled to the judgment of a jury. Were it otherwise, the right of trial by jury would be, in a measure, destroyed, and the writ of assistance would largely usurp the office of an action in ejectment. The writ of prohibition will issue as prayed for. Gordon, C. J., and Reavis, J., concur. Fullerton, J., dissents.

#### **Sec. 527. Writ of assistance.**

The case reported is followed and approved in *State ex rel. Baruch v. Moore*, 21 Wash. 628 (59 Pac. Rep. 487). A writ of assistance should not issue against any but a party to the suit against which it is sought, or his privies, or one coming into possession pendente lite. *Comer v. Felton*, 22 U. S. App. 313 (61 Fed. Rep. 731); *Pidcock v. Melick*, N. J. (3 Cent. Rep. 676); *Wiley v. Carlisle*, 93 Ala. 237 (9 So. Rep. 288); *Terrell v. Allison*, 21 Wall. 289; *Paine v. Root*, 121 Ill. 77 (13 N. E. Rep. 541); *Exum v. Baker*, 115 N. C. 242 (20 S. E. Rep. 448; 44 Am. St. Rep. 449). A writ of assistance in equity will issue to put the plaintiff into possession of land, where delivery of such possession

has been directed by the decree, or where the right to such possession flows out of that which has been established by the decree. The practice is not confined to mortgage foreclosure proceedings. *Appeal of Church*, Pa. St. (13 Atl. Rep. 756); *Kirsch v. Kirsch*, 113 Cal. 56 (45 Pac. Rep. 164). On this subject the supreme court of Wisconsin, in the case of *Stanley v. Sullivan*, 71 Wis. 585 (37 N. W. Rep. 801; 5 Am. St. Rep. 245), say: "Courts of equity have from the earliest times exercised the right to issue the writ of assistance in actions in equity brought for the purpose of determining the rights of the litigants to the title or possession of real estate, after judgment declaring such rights, as well as in cases for the foreclosure of or redemption of mortgages. In such cases the court of equity having jurisdiction of the persons and property in controversy have, after determining the rights of the parties litigant to the title or possession of real estate, rightfully assumed the power to enforce their judgments by the writ of assistance to transfer the possession, instead of turning the party over to a court of law to recover such possession. *Roberdeau v. Rous*, 1 Atk. 543; *Penn v. Lord* Baltimore, 1 Ves. Sr. 444; 2 Eden, Inj. 261 (Wat. Ed. vol. 2, p. 425); *Stribley v. Hawkie*, 3 Atk. 275; *Huguenin v. Baseley*, 15 Ves. 180; *Garratson v. Cole*, 1 Har. & J. 387; *Buffum's Case*, 13 N. H. 14; *Devaucene v. Devaucene*, 1 Edw. Ch. 272; *McKomb v. Kankey*, 1 Bland, 363; *Kershaw v. Thompson*, 4 Johns. Ch. 610; *Valentine v. Teller*, 1 Hopk. Ch. 422; *Diggle v. Boulden*, 48 Wis. 477 (4 N. W. Rep. 678); *Schenck v. Conover*, 13 N. J. Eq. 220 (78 Am. Dec. 95)." To entitle a purchaser at a judicial sale to a writ of assistance, he must show a valid judgment. *Vermont Loan & Trust Co. v. McGregor*, Ida. (51 Pac. Rep. 104). The issuing of a writ of assistance rests in the sound discretion of the court, and the writ will be issued only when the right is clear, and there is no appearance of equity in the defendant, or where there is not a bona fide contest relative to the right of possession. *Hagerman v. Heltzel*, 21 Wash. 444 (58 Pac. Rep. 580). A question of title will not be tried on an application for the writ of assistance, as against persons in possession, claiming adversely and not bound by the decree of sale. *Exum v. Baker*, 115 N. C. 242 (20 S. E. Rep. 448; 44 Am. St. Rep. 449); *Ex parte Jenkins*, 48 S. C. 325 (26 S. E. Rep. 686). A purchaser's application for a writ of assistance will be dismissed where it appears that there will be a contest as to his title having been fully determined. *Roach v. Clark*, 150 Ind. 93 (48 N. E. Rep. 796; 65 Am. St. Rep. 353; see *Ballards' Law of Real Property*, Vol. VI, § 449). A purchaser at an execution sale is not entitled to a writ of assistance, under Wis. Rev. Stat., § 3025, until his title has been fully perfected. *Stanley v. Sullivan*, 71 Wis. 585 (37 N. W. Rep. 801; 5 Am. St. Rep. 245).

As against parties to the foreclosure suit and privy to the mortgagor, a writ of assistance is the proper remedy, in favor of the purchaser at a foreclosure sale, to compel them to surrender possession. *Anderson v. Thompson*, Ariz. (20 Pac. Rep. 803); *Hibernia Sa.*



& Loan Soc. v. Lewis, 117 Cal. 577 (47 Pac. Rep. 602); Motz v. Henry, 8 Kan. App. 416 (54 Pac. Rep. 796); Daggs v. Wilson, Ariz. (59 Pac. Rep. 150). The writ will not lie against one not made a party who was in possession, under claim of right, before the commencement of the foreclosure suit. *Ex parte Jenkins*, 48 S. C. 325 (26 S. E. Rep. 686). The fact that the parties to an application for a writ of assistance are only privies to the original foreclosure suit, and not named therein, does not violate the principle that the writ will issue only against parties to the suit, or their representatives, *Hagerman v. Heltzel*, 21 Wash. 444 (58 Pac. Rep. 580); and a stranger to the decree purchasing at the sale or the vendee or assignee of the purchaser may have the writ, *McLane v. Piaggio*, 24 Fla. 71 (3 So. Rep. 823); *Ketchum v. Robinson*, 48 Mich. 618 (12 N. W. Rep. 877); *Motz v. Henry*, 8 Kan. App. 416 (54 Pac. Rep. 796). The writ will not be issued until after the confirmation of the sale. *Meehan v. Blodgett*, 91 Wis. 63 (64 N. W. Rep. 429). A purchaser may have the writ pending appeal from the decree where he was not a party thereto and cannot be affected by its reversal. *Lambert v. Livingston*, 131 Ill. 161 (23 N. E. Rep. 352). Where at the same time at which final judgment is rendered in a foreclosure proceeding confirming the sale and directing the execution of a deed to plaintiff, a motion and order for writ of assistance is made, no actual notice to defendant of the motion is necessary, defendant being presumed to have notice of all motions made at such term. *Coor v. Smith*, 107 N. C. 430 (11 S. E. Rep. 1089). Where the parties to a foreclosure suit derived their title from a common source, the complainant purchasing the premises on a decree by default will not be awarded a writ of assistance, as against the defendant asserting the acquisition of title from another source which was not put in issue by the complainant's bill. *Chadwick v. Island Beach Co.*, 42 N. J. Eq. 602 (8 Atl. Rep. 650). For discussion of right of purchaser at foreclosure sale to writ of assistance, see *Wiltzie on Mortgage Foreclosures*, §§ 593-599.

#### EPITOME OF CASES.

**Sec. 528. What constitutes a valid mortgage—Formal requisites.** A pre-existing debt, already due, is a sufficient consideration for the execution of a mortgage to secure the same. *Longfellow v. Barnard*, 58 Neb. 612 (79 N. W. Rep. 255; 76 Am. St. Rep. 117). An assignment of a lease for a term of years by a lessee is a mortgage, under Cal. Civ. Code, § 2924. *Commercial Bank v. Pritchard*, 126 Cal. 600 (59 Pac. Rep. 130). Cal. Civ. Code, §§ 2920, 2924 construed and ap-

plied—as to what constitutes a mortgage—particular transaction held not to be a mortgage. *Woodard v. Hennegan*, 128 Cal. 293 (60 Pac. Rep. 769). The fact that a mortgage bears a certificate of acknowledgment in due form by a proper officer constitutes prima facie proof of its execution. *Blewett v. Bash*, 22 Wash. 536 (61 Pac. Rep. 770). In Kentucky a mortgage in which the wife of the mortgagor does not join is valid, except to the extent of the homestead exemption or dower. *First Nat. Bank v. Root*, Ky. (50 S. W. Rep. 16; 20 Ky. Law Rep. 1863). In construing Civ. Code, § 2724, providing that a mortgage may be attested by “any notary public or justice of any court in this state,” the word “justice” is used as being interchangeable with “judge,” and under this provision a judge of the superior court of Georgia has authority to attest mortgages. *Strauss v. Maddox*, 109 Ga. 223 (34 S. E. Rep. 355). A written instrument signed by creditors of the mortgagor in which they agree that he may execute a mortgage on his land and that they will look to the remainder of his estate, though recorded with the mortgage, does not create a lien on any part of his estate, where it is not signed by him, does not describe any property or contain any language indicating an intention of any person, as grantor therein, to give a lien to secure the payment of a debt. *Harned v. Mutual Life Ins. Co.*, Ky. (53 S. W. Rep. 27; 21 Ky. Law Rep. 750). A contract between a mortgagor and a third party by which the latter agrees to furnish part of the money necessary to purchase the mortgage, take an assignment thereof, foreclose it and purchase at the sale, and assign the certificate to the mortgagor upon being reimbursed for his outlay, places him in the relation of a mortgagee as to any title he may acquire to the property under the arrangement and gives the mortgagor the right to redeem within the statutory period, and the statutory right to crops grown on the premises during the year of redemption. *Harrington v. Foley*, 108 Ia. 287 (79 N. W. Rep. 64). A husband may execute a valid mortgage to secure an agreement to support his wife. See opinion for particular evidence held insufficient to show that such a mortgage was obtained by duress. *Hann v. Crickler*, N. J. Eq. (43 Atl. Rep. 1063). Particular recital in a mortgage held insufficient to support a promise to pay the sums mentioned therein. *Coleman v. Fisher*, 67 Ark. 27 (53 S. W. Rep. 671). For particular case in which it was



held that a mortgage should be set aside on account of the mortgagor's incompetency, see *Holmes v. Martin*, 123 Mich. 155 (81 N. W. Rep. 1072).

**Sec. 529. Validity and construction of contracts between mortgagor and mortgagee.** Parties to a mortgage, as against subsequent parties in interest, cannot stipulate by an unrecorded agreement for any terms not a part of the original contract. *Bunker v. Barron*, 93 Me. 87 (44 Atl. Rep. 372). A stipulation in notes secured by a mortgage that they are payable in gold coin of the United States of America of the then standard weight and fineness is valid and may be enforced, although other kinds of legal tender money may be in circulation. *Dorr v. Hunter*, 183 Ill. 432 (56 N. E. Rep. 159). A stockholder in a company which has executed a mortgage on its property to a school district may make an agreement with the mortgagee to purchase the property at a foreclosure sale and convey it to him. *Du Val v. School District*, 67 Ark. 67 (53 S. W. Rep. 562). Although a parol contract between the mortgagee and his mortgagor by which the former is to take possession and after payment of his debt out of the rents and profits to restore the property to the mortgagor, cannot be specifically enforced, on account of the statute of frauds, it may be made the basis of an equitable estoppel to prevent the mortgagee from asserting title through a foreclosure in violation thereof. *Higgins v. Haberstraw*, 76 Miss. 627 (25 So. Rep. 168). A grantor of an absolute deed intended as a mortgage may extinguish the mortgage and substitute therefor a simple option to purchase by afterward conveying the premises absolutely to the grantee in consideration of a release of the debt and taking from his grantee an obligation to reconvey upon certain conditions, there being no obligation on the part of the grantor to perform the conditions and no unfair advantage having been taken in the transaction. *Kunert v. Strong*, 103 Wis. 70 (79 N. W. Rep. 32). One giving a mortgage upon a homestead and other property to secure several notes, after default in their payment, cannot claim the benefit of an agreement that the homestead should be released upon payment of the first three notes at maturity, by having the other property sold first and on enough being sold therefrom to pay the first three notes, have the homestead released. *Stephens v. Leonard*, 122 Mich. 125 (80 N. W. Rep. 1002).

A contract by a mortgagee, who has obtained title to the property through foreclosure, giving the mortgagor the right to the possession of the premises for a reasonable time upon his covenant to pay taxes, and agreeing to reconvey to him upon his payment of the amount due with costs within such a time, is a conditional sale and not an extension of the time for redemption. *Russell v. Finn*, 110 Ia. 301 (81 N. W. Rep. 589). An agreement between a mortgagor, his mortgagee and a third person by which the mortgagor conveys the land to his mortgagee as a means of satisfying the debt, and the latter conveys to the third party who is to pay in installments secured by a mortgage, a price which exceeds the original mortgage debt, the excess to go to the original mortgagor and which is to be paid first out of the moneys paid by the vendee after deducting the amount paid as interest, fixes the rights of such mortgagor as to the excess, and they are not affected by any question of merger or by the original mortgagee taking back the land and releasing the vendee's mortgage. *Walters v. Ward*, 153 Ind. 578 (55 N. E. Rep. 735).

**Sec. 530. Equitable mortgages—Mortgage by deposit of title deeds.** A mortgage executed by a corporation, although certain statutory requirements were not observed, will be held valid in equity as against junior judgment creditors, where it was executed in pursuance of a valid written agreement by the mortgagor to give a first mortgage upon its assets, for a certain amount and for a specified consideration, which agreement was fully performed by the party taking the mortgage. *Hamilton Trust Co. v. Clemes*, 163 N. Y. 423 (57 N. E. Rep. 614). The court say: "In *re Howe*, 1 Paige, 125, Chancellor Walworth stated that he had found no case reported in this state where the subject had been examined; but after reviewing the English authorities, and some in other states, he reached the conclusion that an agreement for a mortgage is, in equity, a specific lien on the land, prior and superior to the claims of subsequent judgment creditors. This case was followed by that of *Chase v. Peck*, 21 N. Y. 581, where, upon receiving a grant of land, the grantee executed an agreement, not under seal, to support and maintain the grantor; pledging for that purpose the produce of the land, and, should that prove insufficient, appropriating the entire fee. The grantee, having become insolvent and unable to perform his



contract to maintain the grantor, reconveyed the land, partly for the purpose of providing for the support of the grantor, and partly to hinder and delay creditors. It was held that the agreement, being the consideration for the grant, took effect as an equitable mortgage of the land, and that a judgment creditor purchasing the land upon the sale under execution took subject to the equitable mortgage. It was further held that the remedy of the judgment creditor was an action to redeem and for accounting, if necessary. *Payne v. Wilson*, 74 N. Y. 348, is an instructive case upon the subject. Judge Folger, following the cases already cited, held, with the concurrence of all the judges who participated in the decision, that 'an equitable mortgage may be constituted by any writing from which the intention so to do may be gathered, and an attempt to make a legal mortgage, which fails for the want of some solemnity, is valid in equity; \* \* \* that an agreement for a mortgage is, in equity, a specific lien upon the land; \* \* \* and that an equitable mortgage thus created is entitled to a preference over subsequent judgment creditors.' The most remarkable case in this state is that of *Perry v. Board of Missions*, 102 N. Y. 99 (6 N. E. Rep. 116). A board of missions was authorized to take and hold property used for diocesan purposes, but was subject to the directions given it by the diocesan convention, which appointed a committee to take steps for procuring a residence for the bishop of the diocese. The plaintiff, under the advice of the bishop, and with the consent of the committee, purchased certain premises, and, at the request of the bishop, commenced making repairs and improvements. The committee reported the facts to the annual meeting of the convention, which passed a resolution directing the transfer of the title of the property to the defendant, to be held and used as a residence for the bishop, and authorizing it to execute a bond and mortgage thereon to secure the payment of a prior mortgage, and of the sum advanced for repairs, etc. When this resolution was passed the work of repair was in progress, but only a small part thereof had been paid for. The plaintiff advanced the money to complete the work. The premises were conveyed to the defendant as directed, and a resolution was passed by its directors accepting the conveyance, and directing the execution of a bond and mortgage for the sum specified, to be applied to the payment of the prior mortgage, and the ex-

penses of the repairs and improvements. This was done, but, when the moneys realized were applied as directed, they were insufficient to pay the whole amount so advanced by the plaintiff. It was held that the plaintiff was entitled to a lien in the nature of a mortgage upon the premises for the balance, both because of the special agreement embodied in the resolution of the convention, and under the general doctrine of equity, which gives a right equivalent to a lien when the rights of the parties cannot be otherwise secured; that the said resolution was not limited to the sums already advanced, but included as well all subsequent advances for the purposes specified; and that, in an action to have an equitable lien declared, a judgment directing a sale of the property as in case of a mortgage foreclosure was proper. So, in *Canal Co. v. Vallette*, 21 How. 414 (16 L. Ed. 154), it was held that bonds issued by a canal company, pledging the real and personal property of the company for the payment of the debts, and containing other corresponding stipulations, will be treated by a court of equity as a mortgage, and enforced according to the intention of the contracting parties. See, also, *Husted v. Ingraham*, 75 N. Y. 251; *Hale v. Bank*, 64 N. Y. 555; *Pom. Eq. Jur.* § 1237; *Jones, Mortg.* § 163; *Thomas, Mortg.* § 46; *Miller, Eq. Mortg.* pp. 1, 2, 216; *Jones, Ry. Sec.* § 73."

An equitable mortgage is held to be created by the deposit of his title deeds by the maker of a note for one hundred dollars accompanied by a written instrument executed by him to the payee of the note which refers to the note and recites: "I this day deposit with him as security my government patent to 160 acres of timber land in Humboldt county,—certificate No. 7072,—dated at Washington, D. C., the 18th day of October, 1889; said certificate to be returned to me if the sum of one hundred dollars and interest at the rate of one per cent. per mo. is paid in one year from date. I further agree to transfer and sign over to Chas. H. Higgins all my right and title to said 160 acres of land,—certificate No. 7072,—should I fail to pay my obligation of one hundred dollars." *Higgins v. Manson*, 126 Cal. 467 (58 Pac. Rep. 907; 77 Am. St. Rep. 192).

**Sec. 531. Duress in procuring mortgage.** A mortgage obtained by duress will be set aside. *Galusha v. Sherman*, 105 Wis. 263 (81 N. W. Rep. 495), collating and dis-



cussing numerous authorities as to what constitutes duress. See, on this subject, *Loud v. Hamilton*, Tenn. (51 S. W. Rep. 140; 45 L. R. A. 400). Threats to arrest a man for embezzlement unless his wife will execute a note and mortgage, which are sufficient to control her will, constitute duress which will avoid the instrument as between the original parties, but such a defense is cut off by the transfer of the mortgage to an innocent purchaser for value and before maturity. *Mack v. Prang*, 104 Wis. 1 (79 N. W. Rep. 770; 45 L. R. A. 407; 76 Am. St. Rep. 848). As to what evidence is admissible in such a case to prove the duress, see *State Bank of Chatham v. Hutchinson*, Kan. (61 Pac. Rep. 443). Applying N. C. Laws 1889, ch. 389, it is held that the foreclosure of a mortgage bearing a certificate of acknowledgment showing the privy examination of the wife cannot be defended against on the ground that her signature was obtained through compulsion by her husband, it not being shown that the mortgagee was connected in any way with the compulsion. *Butner v. Blevins*, 125 N. C. 585 (34 S. E. Rep. 629). The principle of this case is supported by *Shell v. Holston Nat. Bldg. & L. Ass'n*, Tenn. (52 S. W. Rep. 909).

**Sec. 532. National Bank mortgages.** A mortgage of real estate taken by a national bank to secure a contemporaneous loan of money is valid between the parties, and only the government can question the legality of the transaction. *State v. Campbell*, 64 N. J. L. 186 (44 Atl. Rep. 863). Citing, *Bank v. Matthews*, 98 U. S. 621 (25 L. Ed. 188); *Bank v. Whitney*, 103 U. S. 99 (26 L. Ed. 443). A national bank taking a mortgage on real estate may enforce it; and, where it takes a note without knowledge that it is so secured, it may claim and enforce the same when afterward discovered. *George v. Somerville*, 153 Mo. 7 (54 S. W. Rep. 491).

**Sec. 533. Construction of mortgage.** S. C. Laws 1898, p. 747, § 1, providing that "all contracts secured by mortgage of real estate situate within this state shall be subject to and construed by the laws of this state, regulating the rate of interest allowed, and in all other respects without regard to the place named for the performance of the same," does not apply to mortgages executed before its passage.

Mutual Aid, L. & Inv. Co. v. Logan, 55 S. C. 395 (33 S. E. Rep. 372). For construction of particular mortgage, see main v. Ray, Ky. (57 S. W. Rep. 7). As to interest conveyed, see Waits v. Bailey, 192 Pa. St. 562 (44 Atl. Rep. 262). For note on Effect of stipulation that mortgagor shall, on default, become a tenant, see 49 L. R. A. 435-439.

**Sec. 534. Title of parties and right to possession.**

Where a mortgage merely creates a security for a debt the interest of the mortgagee is not vendible under execution. Strauss v. White, 66 Ark. 167 (51 S. W. Rep. 64). In the absence of a stipulation to that effect in his mortgage, a mortgagee has no right to possession of the mortgaged premises prior to foreclosure and sale; and an agreement between him and the mortgagor giving him this right, made pending an action by a third person to enforce a judgment lien against the premises, is not enforceable against the latter. State v. Superior Court, 21 Wash. 564 (58 Pac. Rep. 1065). Construing and applying Colo. Code, § 261, providing that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale," it is held that a mortgagor's right to possession is not divested by a void foreclosure sale, and he or his successors in title may maintain ejectment against the purchaser at such a sale. Lewis v. Hamilton, 26 Colo. 263 (58 Pac. Rep. 196). In Florida a mortgage on real estate is nothing more than a lien on land to secure the payment of money, and a mortgagee can maintain no action for possession until he becomes the owner at foreclosure sale. Coe v. Finlayson, 41 Fla. 169 (26 So. Rep. 704). Mass. Pub. Stat., ch. 133, § 6; ch. 175, § 1 construed and applied—right of administrator of deceased mortgagee to recover possession—action for forcible entry or detainer. Cunningham v. Davis, 175 Mass. 213 (56 N. E. Rep. 2). S. Dak. Comp. Laws, § 4358, providing that "a mortgage does not entitle the mortgagee to the possession of the property unless authorized by the express terms of the mortgage," applies to an absolute deed given as security for a debt, and neither the grantee therein nor one acquiring his interests with knowledge of the nature of the instrument is entitled to the pos-



session of the property. *Shimerda v. Wohlford*, 13 S. Dak. 155 (82 N. W. Rep. 393). Substantially the same is held under a similar statute in Iowa (Code 1873, § 1938). *Harrington v. Foley*, 108 Ia. 287 (79 N. W. Rep. 64). Under Utah Rev. Stat. 1898, § 3517, a mortgage is a mere security which vests in the mortgagee no estate in the mortgaged lands, either before or after condition broken, but it is regarded as a mere security operating upon the property as a lien or incumbrance only. *Sidney Stephens Imp. Co. v. South Ogden L., Bldg. & Imp. Co.*, 20 Utah, 267 (58 Pac. Rep. 843). The same is held in Oklahoma. *Balduff v. Griswold*, 9 Okla. 438 (60 Pac. Rep. 223).

**Sec. 535. Recovery for trespass upon mortgaged premises.** In Alabama, as against a stranger, the mortgagor may maintain an action for the recovery of the statutory penalty for cutting trees on the mortgaged land. *Hamilton v. Griffin*, 123 Ala. 600 (26 So. Rep. 243). In a suit brought by the owner and mortgagor of lands against a trespasser, before suit brought by the mortgagee, the owner is entitled to recover compensation for the entire damage done to the premises, and such recovery will be a bar to a subsequent suit by the mortgagee; but the court will so exert its equitable powers to control the disposition of the sum recovered that no injustice may be done. When the mortgagee institutes a suit, he is entitled to recover such a sum as will compensate him for the injury done to the mortgage as a security; and, in an aftersuit by the owner of the fee against the trespasser, the latter may give in evidence the recovery by the mortgagee, in mitigation of damages. *Delaware & A. Telegraph & Telephone Co. v. Elvins*, 63 N. J. L. 243 (43 Atl. Rep. 903; 76 Am. St. Rep. 217).

**Sec. 536. After-acquired property—Mortgage to secure advances.** A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands; and if such property be already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. *General Elec. Co. v. Transit Equip. Co.*, 57 N. J. Eq. 460 (42 Atl.

Rep. 101). Construing and applying Ga. Civ. Code, § 2723, limiting the subject matter upon which a mortgage lawfully can operate, to "property in possession or to which the mortgagor has a right of possession at the time" the mortgage is executed, it is held that a mortgage does not attach to property subsequently acquired by the mortgagor, although the mortgage purports to create in the mortgagee's favor a lien on any interest in the described realty which the mortgagor might acquire after the time of its execution. *Durant v. D'Auxy*, 107 Ga. 456 (33 S. E. Rep. 478). Where the mortgage consists of an absolute deed, duly recorded, and a conditional bond back for reconveyance, which has not been recorded, an after-purchaser is not bound by a provision in the bond securing future advances, unless he had actual notice of the terms of the bond when his own conveyance was taken. A mortgage properly may be made to secure future advances in addition to present indebtedness; and when the present indebtedness is for money hired upon the security of a farm, other money, subsequently hired by the mortgagor of the mortgagee, with which to purchase other land for the enlargement of the farm, appropriately may be covered by a clause in the mortgage that it shall secure "also all other debts which the mortgagor may contract with the mortgagee." *Bunker v. Barron*, 93 Me. 87 (44 Atl. Rep. 372).

**Sec. 537. Deeds construed as mortgages.** A deed, though absolute on its face, when given as a security only, will be treated as a mortgage. *Mooney v. Byrne*, 163 N. Y. 86 (57 N. E. Rep. 163); *Cumps v. Kiyo*, 104 Wis. 656 (80 N. W. Rep. 937). A conveyance given as security for the payment of a debt will be treated as a mortgage, notwithstanding the parties agree that it shall be an absolute conveyance. *Hodgkins v. Wright*, 127 Cal. 688 (60 Pac. Rep. 431). The court say: "They cannot, by agreeing to call or to consider an instrument which hypothecates real estate for the payment of a debt some thing other than a mortgage, avoid the necessity of foreclosure, or deprive the debtor of his right to redeem. If in fact and in law the instrument is a mortgage, it does not matter that the parties intend and stipulate that it shall be something else, and that, in case of a failure to pay, the title of the mort-



gagee shall be absolute." Where the wife of a grantor who has conveyed lands to secure a debt afterward pays the loan out of her money and takes a deed to the property, he is entitled to have such deed declared an equitable mortgage. *Darling v. Darling*, 123 Mich. 307 (82 N. W. Rep. 48). In order to constitute a deed absolute on its face a mortgage, it is not necessary that the conveyance should be made by the debtor, or by him in whom the equity of redemption will exist. It is sufficient if the debtor, who claims to occupy the position of mortgagor with the right of redemption, has an interest, legal or equitable, in the premises, and the grantee of the legal title acquired such title by the act and assent of the debtor, and as a security for his debt. *Balduff v. Griswold*, 9 Okla. 438 (60 Pac. Rep. 223). A conveyance of land in fee, with an agreement in writing from the grantee to the grantor that, upon payment by the grantor to the grantee of a sum of money at a stated time, the grantee shall reconvey the land, and that the grantor may occupy the premises, so long as he fulfills his part of the agreement, but that upon breach of any part of it he should forfeit all right to the land and money paid on account of it as well, creates an equitable mortgage. *Hawes v. Williams*, 92 Me. 483 (43 Atl. Rep. 101). An instrument in the form of an absolute deed which provides that it is for the purpose of securing a debt, gives the grantee a power of sale, requires the payment of any surplus after the satisfaction of the debt to the grantor and upon payment of the debt the deed is to be null and void and a quitclaim deed is to be made to the grantor, will be treated as a mortgage. *National Bank of Columbus v. Tennessee C., I. & R. Co.*, 62 O. St. 564 (57 N. E. Rep. 450). A conveyance executed by two persons indebted to several to one of their creditors in which it is provided that the premises shall be reconveyed on the payment to the grantee of a "sum of money equal to the claims and evidences of indebtedness that the grantee shall have against" the debtors, will stand as security for future advances and for claims against them which the grantee subsequently purchases. *Collins v. Gregg*, 109 Ia. 506 (80 N. W. Rep. 562). Ga. Civ. Code, § 2771, et seq., does not prevent a debtor from executing an absolute deed to his creditor for the purpose of securing a debt, without receiving from the

creditor a bond to reconvey the property described in the deed upon payment of the debt. *Jewell v. Walker*, 109 Ga. 241 (34 S. E. Rep. 337).

An agreement between the owner of land sold under a trust deed and the purchaser at such sale that the former may repurchase the property within a stated time, which he fails to do, does not make the sale under the deed a mortgage conferring on the original owner the privilege of redeeming within a reasonable time. *Cockrill v. Whitworth*, Tenn. (52 S. W. Rep. 524).

An absolute deed, a condition in which gives the grantor merely an option to have a reconveyance upon payment of a certain sum within a specified time to his grantee, but which does not give the grantee the right to insist upon such payment, will be construed as a conditional sale and not as a mortgage. *Blumberg v. Beekman*, 121 Mich. 647 (80 N. W. Rep. 710). Particular transaction held to be a sale in which the seller reserved the privilege to repurchase, and not a mortgage. *Martin v. Martin*, 123 Ala. 191 (26 So. Rep. 525).

**Sec. 538. Deeds construed as mortgages—Title and rights of parties—Pleading and practice in actions between.** An absolute deed intended as a mortgage does not transfer title either to the grantee or to one to whom he conveys who has notice of the character of the instrument and of the relation between the parties to it. *Le Comte v. Pennock*, 61 Kan. 330 (59 Pac. Rep. 641). Courts will exact from a creditor taking an absolute conveyance to secure his debt the utmost good faith in his subsequent dealings with the debtor with respect to the security involved. *O'Toole v. Omlie*, 8 N. Dak. 444 (79 N. W. Rep. 849.) Citing, *Sedg. & W. Title Land*, § 344; *Hyndman v. Hindman*, 19 Vt. 10 (46 Am. Dec. 171); *Niggeler v. Maurin*, 34 Minn. 118 (24 N. W. Rep. 369); *Odell v. Montross*, 68 N. Y. 499. One seeking to declare an absolute deed to be a mortgage is not required to allege that it was obtained through mistake, undue influence or fraud. *Brickle v. Leach*, 55 S. C. 510 (33 S. E. Rep. 720). In an action for reconveyance of property transferred by an absolute deed to secure a debt, instead of a judgment of foreclosure, it is proper for the court to fix a time in which the plaintiff may redeem on payment of the amount due. *Collins v.*

Gregg, 109 Ia. 506 (80 N. W. Rep. 562). In California it is held that where, in an action brought for that purpose, an absolute deed is declared to be a mortgage, the mortgagor's equity cannot be cut off by a decree divesting him of it if he shall not pay the sum found due within a certain time, but the title remains in him until divested by foreclosure and sale. *Byrne v. Hudson*, 127 Cal. 254 (59 Pac. Rep. 597). Upon failure of the debtor to pay the debt at maturity, to secure which he has given his creditor an absolute conveyance, the creditor may institute suit thereon, and may pray for and obtain a special judgment subjecting the property described in the deed to the payment of the debt. *Jewell v. Walker*, 109 Ga. 241 (34 S. E. Rep. 337). Where one to whom land has been conveyed by an absolute deed which in fact is a mortgage sells and conveys the land to a bona fide purchaser, disregarding the rights of his grantor to redeem, a court of equity will charge him with the value of the land at the time of the sale and regard it as the land itself and enforce the original grantor's right to redeem against the mortgagee or his heirs; and the statute of limitations barring an action on a money demand is not applicable to such an action. *Mooney v. Byrne*, 163 N. Y. 86 (57 N. E. Rep. 163).

**Sec. 539. Action to declare deed a mortgage—Sufficiency of proof.** A deed absolute on its face may be shown to be a mortgage by parol evidence. *Balduff v. Griswold*, 9 Okla. 438 (60 Pac. Rep. 223); *Meyer v. Davenport Elevator Co.*, 12 S. Dak. 172 (80 N. W. Rep. 189). Parol evidence is admissible to show that an instrument in the form of a warranty deed of certain land, stating that it was given "as security for money owing" the mortgagee, "and upon my notes," and that the land should be reconveyed "upon payment of my liability" to the mortgagee, was intended by the parties to secure indebtedness incurred by the grantor to the grantee between the date of its execution and the date of its delivery, but such evidence is not admissible to show that the instrument was intended to secure future advances made after its delivery. *Swedish-American Nat. Bank v. Germania Bank*, 76 Minn. 409 (79 N. W. Rep. 399). A deed will not be decreed to be a mortgage where the value of the land conveyed is much less than the indebtedness be-



tween the parties. *Paris v. Poss*, 104 Tenn. 122 (56 S. W. Rep. 835). In order to overcome the presumption that an absolute deed is what it purports to be, and show it to be a mortgage, the proof must be clear, satisfactory and convincing. *Williams v. Williams*, 180 Ill. 361 (54 N. E. Rep. 229); *Blair v. Squire*, 127 Cal. XVII (59 Pac. Rep. 211); *Jones v. Rush*, 156 Mo. 364 (57 S. W. Rep. 118). For particular cases in which the evidence was held sufficient to show an absolute deed to be a mortgage, see *Wilde v. Homan*, 58 Neb. 634 (79 N. W. Rep. 546); *O'Toole v. Omlie*, 8 N. Dak. 444 (79 N. W. Rep. 849); *Sellers v. Sellers*, Tenn. (53 S. W. Rep. 316). For particular fact cases in which the evidence is held insufficient to show an absolute deed to be a mortgage, see *Blair v. Squire*, 127 Cal. XVIII (59 Pac. Rep. 211); *Garwood v. Wheaton*, 128 Cal. 399 (60 Pac. Rep. 961); *Shiver v. Arthur*, 54 S. C. 184 (32 S. E. Rep. 310); *Brown v. Bank of Sumter*, 55 S. C. 51 (32 S. E. Rep. 816); *Bobb v. Wolff*, 148 Mo. 335 (49 S. W. Rep. 996); *Jones v. Rush*, 156 Mo. 364 (57 S. W. Rep. 118); *Maney v. Morris*, Tenn. (57 S. W. Rep. 442); *Abbott v. Gruner*, 121 Mich. 140 (79 N. W. Rep. 1065). For particular cases as to what evidence may be considered in determining whether a deed is a mortgage, see *Ashton v. Ashton*, 11 S. Dak. 610 (79 N. W. Rep. 1001); *Garwood v. Wheaton*, 128 Cal. 399 (60 Pac. Rep. 961); *Brickle v. Leach*, 55 S. C. 510 (33 S. E. Rep. 720).

**Sec. 540. Priority of mortgages.** A mortgage executed by a judgment debtor upon land simultaneously with his receipt of the conveyance to him, to a third person to secure a debt other than for the purchase money, is subordinate to the lien of existing judgments against him. *Weil v. Casey*, 125 N. C. 356 (34 S. E. Rep. 506; 74 Am. St. Rep. 644). In Georgia it is held that the holder of a security deed infected with usury cannot base thereon a claim which will prevail over the lien of a judgment creditor, although his judgment was obtained after the execution and delivery of such deed. *Stone v. Georgia L. & T. Co.*, 107 Ga. 524 (33 S. E. Rep. 861). A priority in favor of one of two mortgages executed and recorded at the same time may be established by proof of the agreement of the parties that such priority should exist. *Trompczynski v.*

Struck, 105 Wis. 437 (81 N. W. Rep. 650). A mortgage executed by one not indebted to the mortgagee, purporting to secure a note of even date, but in fact no note was executed, will not be given priority over a later mortgage as to a note executed after the second mortgage, dated back to the date of the first mortgage and corresponding with the note described in it. *Ogden v. Ogden*, 180 Ill. 543 (54 N. E. Rep. 750). The priority of a mortgage which is expressly recognized by one taking a subsequent mortgage on the same premises, is not displaced by being released and a new mortgage substituted for the same indebtedness, where the junior mortgagee is not misled, deceived or injured, and the senior mortgagee agreed to the substitution only on condition that her priority should not be affected. *Roberts v. Doan*, 180 Ill. 187 (54 N. E. Rep. 207). For particular fact cases determining the priority between mortgages, see *Fischer v. Tuohy*, 186 Ill. 143 (57 N. E. Rep. 801); *Gillam v. Barnes*, 123 Mich. 119 (82 N. W. Rep. 38).

**Sec. 541. Priority of purchase money mortgage.** A mortgage given by a purchaser of lands to secure the purchase price to his vendor who held a vendor's lien for the same is superior to a mortgage previously given by him to a third person. *Jones v. Davis*, 121 Ala. 348 (25 So. Rep. 789). A mortgage is a purchase money mortgage, although not reciting that fact, where the delivery of the deed to the mortgagor, and of the mortgage to the mortgagee, were concurrent and simultaneous acts, and the money for which the mortgage was given was, in actual fact, a part of the purchase money paid for the property at the very time of the delivery of the deed. *Commonwealth Title-Insurance & Trust Co. v. Ellis*, 192 Pa. St. 321 (43 Atl. Rep. 1034; 73 Am. St. Rep. 816). A vendee's deed of trust given to secure the balance of the unpaid purchase price is entitled to priority over a mortgage given to a third person to secure a loan to the vendee of money used to pay the cash part of the purchase price, although not recorded until after the mortgage to secure the loan, where the holder of such mortgage has knowledge of all the facts. *Truesdale v. Brennan*, 153 Mo. 600 (55 S. W. Rep. 147).

**Sec. 542. Assumption of mortgage.** A grantee's agreement to assume and pay the mortgage debt as a part of the consideration for the premises conveyed to him, may be proved by parol. *Miller v. Kennedy*, 12 S. Dak. 478 (81 N. W. Rep. 906). Citing numerous authorities. A grantee assumes the payment of a mortgage, interest and taxes, by a stipulation in his deed which reads: "This conveyance is made expressly subject to a mortgage incumbrance, \* \* \* together with interest and taxes, \* \* \* all of which are assumed by the party of the second part." *Field v. Thistle*, 58 N. J. Eq. 339 (43 Atl. Rep. 1072). A purchaser of mortgaged property who has assumed the payment of the mortgage debt is estopped to dispute its validity. *Old Colony T. Co. v. Allentown & B. Rapid-Transit Co.*, 192 Pa. St. 596 (44 Atl. Rep. 319); *Dunn v. Shannon*, Ky. (51 S. W. Rep. 14; 21 Ky. Law Rep. 138). But the grantee in a deed containing an assumption clause is not estopped from denying the validity of the contract of assumption, as against a party who, relying on the recitals in the instrument as spread upon the public records, purchased the debt, secured by a mortgage on the land, *Hare v. Murphy*, 60 Neb. 135 (82 N. W. Rep. 312); and one who purchases without assuming incumbrances, but merely with the expectation of paying the valid liens on the property, is not estopped from questioning their validity, *Waughtal v. Kane*, 108 Ia. 268 (79 N. W. Rep. 91). A mortgagor, who has become insolvent and his successive grantees who have assumed the payment of the mortgage, after the notice of the commencement of the proceedings to foreclose it, by an arrangement among themselves, cannot effect a release of the several covenants of assumption so as to relieve them from liability thereon. *Field v. Thistle*, 58 N. J. Eq. 339 (43 Atl. Rep. 1072). Particular evidence held insufficient to show that a grantee of mortgaged premises assumed the payment of the mortgage. *Rolston v. Markham*, 36 Or. 112 (58 Pac. Rep. 1099). A contract by a husband that, in consideration of a conveyance of a part of the mortgaged premises to his wife, he will pay the notes secured by the mortgage on the premises, binds him to pay the whole indebtedness, and not merely that proportion of it represented by the lands conveyed, and the grantor is entitled, on foreclosure on default of



the husband to pay the debt, to have the conveyed premises first sold to satisfy the debt and execution against the husband for any deficiency. *Mead v. Peabody*, 183 Ill. 126 (55 N. E. Rep. 719). A purchaser of a part of mortgaged premises, who, as a part of the consideration, agrees to pay all of the mortgage debt, upon foreclosure of the mortgage after a conveyance with warranty of the remainder of the property to others, cannot have the property sold in the inverse order of alienation in order to protect his claim of homestead in the land purchased by him, under Wis. Rev. Stat., § 3103. *Perkins v. McAuliffe*, 105 Wis. 582 (81 N. W. Rep. 645).

**Sec. 543. Assumption of mortgage—Taking conveyance subject to mortgage.** A grantee who merely takes the premises subject to a mortgage is not personally liable for its payment. *Crawford v. Nimmons*, 180 Ill. 143 (54 N. E. Rep. 209). A recital in a deed that it is "subject to a mortgage claim of \$1,400 to the trustees of the Smith Charities, the payment of which claim is a part of the consideration named," imports an undertaking on the part of the grantee to pay the mortgage. *Jager v. Vollinger*, 174 Mass. 521 (55 N. E. Rep. 458). Citing, *Carley v. Fox*, 38 Mich. 387, 389; *Tichenor v. Dodd*, 4 N. J. Eq. 454; *Stebbins v. Hall*, 29 Barb. 524, 529; *Moore's Appeal*, 88 Pa. St. 450, 452 (32 Am. Rep. 469); *Locke v. Homer*, 131 Mass. 93, 106 (41 Am. Rep. 199). The right of a holder of a note secured by a mortgage to disregard his security and bring a personal action on the note is not affected by the fact that the mortgagor has conveyed the land to another subject to the mortgage debt. *Anthony Inv. Co. v. Law* 62 Kan. 193 (61 Pac. Rep. 745). The grantor of mortgaged land conveying it subject to the mortgage in such a manner as to leave him personally liable for the debt may take an assignment of the mortgage and the debt, and enforce the mortgage by foreclosure. *Pratt v. Buckley*, 175 Mass. 115 (55 N. E. Rep. 889).

**Sec. 544. Assumption of mortgage—Personal liability on covenant—Who may maintain action.** One who purchases mortgaged premises and assumes as a part of the consideration to pay the mortgage debt becomes personally

liable for any deficiency that may remain after applying the proceeds of the foreclosure sale. *Graves v. McFarland*, 58 Neb. 802 (79 N. W. Rep. 707); *Cumberland Nat. Bank v. St. Clair*, 93 Me. 35 (44 Atl. Rep. 123). In Utah it is held that a purchaser of mortgaged premises who, as a part of the consideration therefor, assumes and agrees to pay the mortgage debt, is personally liable therefor, regardless of the personal liability of his immediate grantor to pay the debt. *Bartch, C. J., dissenting. McKay v. Ward*, 20 Utah, 149 (57 Pac. Rep. 1024; 46 L. R. A. 623). See opinion for exhaustive discussion of authorities on both sides of this question. The same is held in Missouri, *Crone v. Stinde*, 156 Mo. 262 (55 S. W. Rep. 863), overruling *Hichs v. Hamilton*, 144 Mo. 495 (46 S. W. Rep. 432; 66 Am. St. Rep. 431). A subsequent endorsee of a mortgage note may sue on a grantee's covenant of assumption which renders him personally liable therefor. *Harts v. Emery*, 184 Ill. 560 (56 N. E. Rep. 865). A mortgagor against whom a judgment of foreclosure has been rendered may maintain an action against his grantee on the latter's express covenant assuming the payment of the mortgage without proof of payment by himself. *McAbee v. Cribbs*, 194 Pa. St. 94 (44 Atl. Rep. 1066).

**Sec. 545. Assumption of mortgage—Surety relation of grantor—Extensions.** As between a grantor of mortgaged premises who is liable for the debt and his grantee who assumes its payment, the latter is regarded as the principal debtor and the other as surety, and they respectively incur the obligations and acquire the rights that are by law attached to the relation each occupies. If, in such a case, the mortgage is foreclosed, and the land sold to pay the debts, leaving unpaid a portion thereof, which the grantor pays, the latter cannot maintain an action for indemnity on the grantee's covenant of assumption in the deed—the promise therein not running to him—but he must resort to an action on the implied promise of indemnity which arise in every instance where a surety pays the debt of his principal; and his action will be barred by the statute of limitations barring actions of this character. *Poe v. Dixon*, 60 O. St. 124 (54 N. E. Rep. 86; 71 Am. St. Rep. 713). See opinion for discussion of this subject. A mortgagee, who,



with knowledge of the grantee's assumption of the mortgage, makes an agreement with him extending the time for its payment without the mortgagor's consent, thereby discharges him from personal liability for the debt. *Miller v. Kennedy*, 12 S. Dak. 478 (81 N. W. Rep. 906); *Pratt v. Conway*, 148 Mo. 291 (49 S. W. Rep. 1028); 71 Am. St. Rep. 602).

**Sec. 546. Assignment of mortgage.—What constitutes.**

A mortgage passes as incident to an assignment of the debt which it secures. *Citizens' State Bank v. Julian*, 153 Ind. 655 (55 N. E. Rep. 1007); *Whitney v. Lowe*, 59 Neb. 87 (80 N. W. Rep. 266); *German-American Bank v. Carondelet Real-Estate Co.*, 150 Mo. 570 (51 S. W. Rep. 691); *George v. Somerville*, 153 Mo. 7 (54 S. W. Rep. 491). In the absence of a statute to the contrary an assignment of a mortgage is valid without being acknowledged, recorded or attested, and may be made by parol upon delivery of the mortgage and debt, or of the debt alone. An invalid foreclosure sale under a decree of court or under a power of sale, which for any reason fails to pass the title, operates as an assignment of the mortgage; and if the purchaser at such a sale has subsequently sold the property by deed, this amounts to an assignment of the mortgage to such grantee. *Salvage v. Haydock*, 68 N. H. 484 (44 Atl. Rep. 696). For construction of particular assignments, see *Marcus v. Dyer*, 174 Mass. 64 (54 N. E. Rep. 352).

**Sec. 547. Assignment of mortgage.—Title and rights of assignee.** The assignee of a mortgage takes it subject to all equities existing between the mortgagor and the mortgagee at the time of the transfer. *Chicago Title & T. Co. v. Aff*, 183 Ill. 91 (55 N. E. Rep. 659). In discussing and applying this rule it is held by the New York court of appeals that it should be held to apply to those defenses legal and equitable which were available to the mortgagor at the time of the assignment of the mortgage, and that new equities arising or defenses accruing thereafter are not within its application; and it will not be extended so as to include a defense to an actual obligation which was dependent for its existence upon the mortgagor's availing himself in the future of an option conferred by a secret

agreement made between himself and the mortgagee. *Merchants' Bank v. Weill*, 163 N. Y. 486 (57 N. E. Rep. 749; 79 Am. St. Rep. 605). An assignment of mortgages by a written instrument executed by a mortgagee to his daughter which describes the mortgages and stipulates that the assignment was "for her individual use, and above any part of the estate he might leave at his death," passes to her the absolute right both to the mortgages and the notes which they secure, although neither are delivered to her, and she may maintain a claim against her father's estate for the amount of the mortgages, where he has accepted payment thereof and applied the proceeds to his own use. *Hilton v. Woodman's Estate*, 124 Mich. 326 (82 N. W. Rep. 1056). A mortgage taken by a father on land conveyed by him to his son as a gift, for a sum much less than the value of the land, to secure the payment to him of interest on that sum as an annuity, may be foreclosed by one to whom it has been assigned by the father, regardless of his representations made to the son at the time the mortgage was taken to the effect that he did not intend to foreclose it. *Gaither v. Slack*, 89 Md. 727 (43 Atl. Rep. 915). An assignee of a junior mortgage takes subject to an unrecorded agreement between his assignor and the holder of a senior mortgage, to the effect that the priority of the senior mortgage is not to be affected by the holder thereof releasing a part of the mortgaged premises not embraced in the junior mortgage. *Cressman v. Davis*, 57 N. J. Eq. 619 (42 Atl. Rep. 768). One who in good faith takes from the holder thereof an assignment of new notes and a new trust deed, given by the maker to such holder upon his promise to surrender old notes and a trust deed given to secure them, executed by such maker, the holder of the old notes and trust deed having failed to surrender them, may have a judgment on the notes, but he acquires no rights under the trust deed because there was no consideration therefor. *Martina v. Muhlke*, Ind. App. (57 N. E. Rep. 954).

**Sec. 548. Recording assignment of mortgage—Payment to mortgagee after assignment.** In Indiana prior to Rev. Stat. 1894, §§ 1107, 1108 (Rev. Stat. 1901, §§ 1107, 1108) [in force July 2, 1877], an assignment of a mortgage



was not required to be recorded; but under this statute an assignment must be recorded, and a holder thereof who fails to record it and who does not cause himself to be made a party to judicial proceedings affecting the land is bound thereby the same as if he were a party, as against a bona fide purchaser claiming under such proceedings without any actual knowledge of the unrecorded assignment; it is further held that the statute applies to assignments executed before it went into effect, as against a holder thereof who, after such time, had a reasonable time in which he could have recorded his assignment before the rights of subsequent bona fide purchasers attached. *Citizens' State Bank v. Julian*, 153 Ind. 655 (55 N. E. Rep. 1007). Kan. Laws 1897, ch. 160, providing for the recording of assignments of real-estate mortgages and the release of the same by assignees, and providing penalties for failing to record such assignments, and in which is a provision that, if assignments of existing mortgages are not recorded within six months after the taking effect of the act, they shall not be received against the mortgagor in any court of the state, does not impair the obligation of contracts, and is not invalid. The penalty of the statute is the inhibition of the use of the nonrecorded assignment as evidence and not the annulment of the mortgage, nor the destruction of the mortgage lien. *Myers v. Wheelock*, 60 Kan. 747 (57 Pac. Rep. 956). One holding under an unrecorded assignment takes the risk of the wrongful discharge of record by the mortgagee, and the acquisition of title by one relying on the discharge without notice of the assignment. *Passumpsic Sav. Bank v. Buck*, 71 Vt. 190 (44 Atl. Rep. 93). Payment of a mortgage debt to the mortgagee discharges the mortgage, where the person making the payment has no notice of a previous assignment of the mortgage or of circumstances to put him on inquiry; and the mere fact that the mortgagee upon tender of payment says that he has not possession of the bonds which the mortgage is given to secure, but that he will get them, is not sufficient to put one on inquiry as to an assignment of the mortgage. *Mutual Life Ins. Co. v. Hall*, Ky. (50 S. W. Rep. 254; 20 Ky. Law Rep. 1880).

**Sec. 549. Payment, release and satisfaction—Entry of payments or satisfaction on record.** The fact that the mortgagor has paid to the mortgagee the amount due under the mortgage does not operate necessarily as a payment and discharge of the mortgage so as to render a subsequent assignment of it by the mortgagee to a third party invalid. *Anderson v. Learoyd*, 176 Mass. 431 (57 N. E. Rep. 700). When the owner of one parcel of land, who is required by equity to exonerate the owner of another from a mortgage, pays the amount due, or does other acts sufficient to satisfy it, equity will treat the mortgage as satisfied, whatever may have been his intention, or the form of the conveyance from the mortgagee. *Jager v. Vollinger*, 174 Mass. 521 (55 N. E. Rep. 458). Upon the payment of a mortgage or trust deed by the debtor the estate of the mortgagee or trustee ceases, and the legal title reverts in the mortgagor or grantor without a reconveyance. *Schilling v. Darmody*, 102 Tenn. 439 (52 S. W. Rep. 291; 73 Am. St. Rep. 892). The surrender to the mortgagor of the original note, to secure which his mortgage was given, marked "Paid," does not extinguish the debt where he has executed other notes as a substitute for the original. *Bonestell v. Bowie*, 128 Cal. 511 (61 Pac. Rep. 78). Particular evidence held to show that a new note given by a mortgagor to his mortgagee was a renewal of the prior note and not a payment of the mortgage debt. *Cunningham v. Davis*, 175 Mass. 213 (56 N. E. Rep. 2). A release of a mortgage which recites that the entire debt has been paid, but releases only a portion of the mortgaged property, is not conclusive evidence of the fact recited. *Anderson v. McCloud-Love Live-Stock Co.*, 58 Neb. 670 (79 N. W. Rep. 613). A release obtained from a mortgagee without fraud or undue influence so as to give the mortgagor a clear title in order that he may sell the land, is valid and binding. *McMillan v. McMillan*, 184 Ill. 230 (56 N. E. Rep. 302). A husband joining in his wife's warranty deed, merely for the purpose of releasing his dower, thereby does not release a mortgage he holds on the property conveyed. *Center v. Elgin City Banking Co.*, 185 Ill. 534 (57 N. E. Rep. 439). Particular evidence held sufficient to show that a mortgage had been extinguished by a gift thereof to the mortgagor by the mortgagee. *Gannon v. McGuire*,



160 N. Y. 476 (55 N. E. Rep. 7; 73 Am. St. Rep. 694). Ala. Civ. Code 1886, § 1869 (Code 1896, § 1066), providing for the recovery of a penalty from the holder of a mortgage who, on payment thereof, after a certain request, fails to discharge the same of record is held not to apply to a deed of trust given to secure a debt. *Southern Bldg. & L. Ass'n v. McCants*, 120 Ala. 616 (25 So. Rep. 8). A mortgagor may recover the penalty provided in this statute although he may have parted with the property. *Livingston v. Cudd*, 121 Ala. 316 (25 So. Rep. 805). As to what constitutes a sufficient request of the mortgagee to make the entry, see *Clark v. Wright*, 123 Ala. 594 (26 So. Rep. 501). Ala. Code 1896, § 1065 (Code 1886, § 1868) construed and applied—entry of partial payments by mortgagee on margin of the record. *New South Bldg. & L. Ass'n v. Bowie*, 121 Ala. 465 (25 So. Rep. 844).

**Sec. 550. Authority to receive payment—Payment to agent.** One who makes payment to a third party who has not the papers in his possession has the burden of showing the authority of such person to receive payment. *Harrison v. Le Gore*, 109 Ia. 618 (80 N. W. Rep. 670). Where a trustee releases a trust deed, and receives payment of the debt, without actual authority, and without producing the securities, the party paying has notice of the want of power in the trustee to receive payment. *Fortune v. Stockton*, 182 Ill. 454 (55 N. E. Rep. 367). A mortgagor is not justified in presuming the continuance of the agency of a bank to receive payment of a mortgage debt for the mortgagee where he had knowledge that the papers incident to the debt are no longer in its hands, and a payment subsequently made by him to the bank is at his own risk; nor does the fact that the note and mortgage were made payable at such bank establish the agency. *Bloomer v. Dau*, 122 Mich. 522 (81 N. W. Rep. 331). The mere fact that one was an agent to loan money, to secure which a note and mortgage were given, does not give him authority to receive payment thereof. *Fortune v. Stockton*, 182 Ill. 454 (55 N. E. Rep. 367). An agent authorized to loan money upon coupon notes and mortgage security, which are returned to and retained by the principal, has no implied authority to collect the same, without having lawful possession of

such coupon notes and mortgage; and, when he has such possession, he has no implied authority to collect them before due. *Schenk v. Dexter*, 77 Minn. 15 (79 N. W. Rep. 526). One who received applications for loans from a money lender and to whom the latter entrusted money to make loans which he deposited in a bank in his own name, and paid it out after examining the title and papers, collected interest and principal, and remitted it, is, as to a mortgage debtor who knew of the course of business between them, the agent of the lender so as to authorize the debtor to make payment of the principal of a mortgage to him, although he did not have the papers. *Harrison v. Le Gore*, 109 Ia. 618 (80 N. W. Rep. 670). Where the owner of a mortgage note ratifies the unauthorized act of another assuming to act as his agent in accepting payment of the note from the party executing the same, which he converted to his own use, by accepting the benefit of a trust deed executed by such assumed agent to secure his various creditors, thereby ratifies the agency and cannot recover from the original debtor upon such deed being adjudged void. *Keene Five-Cents Sav. Bank v. Archer*, 109 Ia. 419 (80 N. W. Rep. 505).

**Sec. 551. Release of part of mortgaged premises.** A prior mortgagee's release of a part of the mortgaged premises not embraced in a subsequent mortgage, does not affect his lien as against such mortgage, where he had no knowledge of its existence when he made the release. *Cressman v. Davis*, 57 N. J. Eq. 619 (42 Atl. Rep. 768). The release by a senior mortgagee of a portion of the mortgaged property, if made with notice of the junior mortgage, will operate in favor of the junior mortgagee as a satisfaction of the senior mortgage to the extent of the value of the property released. *Anderson v. McCloud-Love Live-Stock Co.*, 58 Neb. 670 (79 N. W. Rep. 613). Where two joint tenants who had mortgaged their lands to secure the payment of a note executed by them afterward had their interests in the land set off to them in severalty by a partition suit, the release of one of their interests by the mortgagee does not operate in favor of the other to the extent of the value of the land released, no surety relation between the parties being shown. *Allen v. Hollings-*



head, 155 Ind. 178 (57 N. E. Rep. 917). An agreement by a mortgagee in a purchase money mortgage made at the time of its execution to release a proportionate amount of the mortgaged premises on payment of a certain sum per acre, "during the pendency of the above described mortgage," does not apply to payments made at the time of the sale, nor can the mortgagor avail himself of the benefit of these stipulations after he has been in default and an action to foreclose has been commenced. *Baldwin v. Benedict*, 111 Ia. 741 (82 N. W. Rep. 956). In order for a mortgagor or his grantee to claim the benefit of a stipulation in his mortgage providing for a release of the lien thereof in case of the sale of a part of the premises upon certain terms, which are provided for the protection of the mortgagee, the sale must be made in strict compliance with such terms. *Weir v. Iron Springs Co.*, 27 Colo. 385 (61 Pac. Rep. 619).

**Sec. 552. Release by mistake or without authority.**

An unauthorized release of a mortgage executed and recorded by a mortgagee after the recording of his prior assignment of the mortgage cannot be relied upon by a second mortgagee to give him priority. *Center v. Elgin City Banking Co.*, 185 Ill. 534 (57 N. E. Rep. 439). Where the holder of a mortgage given to secure the payment of three notes assigns one of the notes to a third person he cannot afterward, upon payment of the two notes held by him, cancel the mortgage so as to affect the rights of his assignee thereunder. *Brewer v. Atkeison*, 121 Ala. 410 (25 So. Rep. 992; 77 Am. St. Rep. 64). The release of a mortgage by one who is not the owner of the debt, although possessed of apparent authority to enter satisfaction, is ineffective, except as to those who deal with the property relying in good faith upon such release. *Whitney v. Lowe*, 59 Neb. 87 (80 N. W. Rep. 266). A purchaser of a second mortgage, who, by its recitals, is charged with knowledge of the existence of a prior mortgage and the ownership of a note secured by it by one other than the original mortgagee, is not justified in relying on a release of the mortgage by the latter. *Passumpsic Sav. Bank v. Buck*, 71 Vt. 190 (44 Atl. Rep. 93). A release of a trust deed given to secure notes made payable to the grantor's order and indorsed by him to another, executed and recorded by the

trustee long after the indebtedness was past due, will protect a mortgagee taking another mortgage on the property relying in good faith upon the understanding that he is acquiring a first lien, as against one to whom the original notes had passed by assignment, but whose rights did not appear of record, although in fact they had not been paid and such holder had no notice of the release, where the original trust deed invested the trustee with legal title and empowered him to reconvey to the grantor all the property remaining in his hands after the satisfaction of the debt. *Mann v. Jummel*, 183 Ill. 523 (56 N. E. Rep. 161).

**Sec. 553. Breach authorizing foreclosure—Failure to pay interest.** A stipulation in a mortgage authorizing foreclosure on default in the payment of interest, authorizes foreclosure in the case of such default, although the principal of the debt is not yet due. *Gore v. Davis*, 124 N. C. 234 (32 S. E. Rep. 554); *Phelps v. Mayers*, 126 Cal. 549 (58 Pac. Rep. 1048); *Farnsworth v. Hoover*, 66 Ark. 367 (50 S. W. Rep. 865). In Texas it is held that foreclosure may be had in case of such a default without an express stipulation authorizing it. *Warren v. Harrold*, 92 Tex. 417 (49 S. W. Rep. 364). A provision in a deed of trust given to secure bonds issued by a street railway company declaring that they should become due after thirty days default in the payment of any coupon, authorizes foreclosure for the entire amount of bonds sold, upon such default. *Rumsey v. People's Ry. Co.*, 154 Mo. 215 (55 S. W. Rep. 615). The commencement by a mortgagee of an action to foreclose upon default in the payment of interest is notice of his exercise of the option to treat the whole amount of the note as due on default in the payment of interest, and no previous notice or demand is necessary. *Bank of Commerce v. Scofield*, 126 Cal. 156 (58 Pac. Rep. 451). When a mortgage to secure the payment of the principal of certain bonds at a specified day, and the interest thereon, according to the provisions of coupons attached to the bonds, contains a covenant that at a fixed time after default in the payment of interest, and after demand, the principal shall become immediately due, and the bonds and coupons are payable at a designated place, default in the payment of interest, within the meaning of



that covenant, will result from the nonpayment of the coupons, although not presented at the designated place, and payment demanded. *New Jersey Paper-Board Mfg. Co. v. Security T. & Safe-Dep. Co.*, N. J. L. (42 Atl. Rep. 746).

**Sec. 554. Foreclosure for a portion of debt—Installment mortgages.** Mortgaged premises may be sold under foreclosure to satisfy a portion of a debt due, and, if a lis pendens was filed at the commencement of the proceeding, the lien of the entire debt may be continued and preserved by the decree of partial foreclosure as against subsequent incumbrances or redemptions. Where a foreclosure of a mortgage is had before the whole debt is due, and a decree directs a sale for the debt due, subject to the lien of the part not due, if the mortgagee, the holder of the entire debt, purchases, and receives a deed for the premises, it will be a satisfaction of the whole debt; but, if redemption is made from the purchaser by the mortgagor, or judgment creditor of the mortgagor, as the debt was not due at sale, the lien will remain in force, and the mortgagee may again foreclose as to it. *Dupee v. Salt Lake Val. L. & T. Co.*, 20 Utah, 103 (57 Pac. Rep. 845; 77 Am. St. Rep. 902). Cal. Code Civ. Proc., § 728 construed and applied—foreclosure of mortgage when part only is due—appeal from subsequent order of sale. *Byrne v. Hoag*, 126 Cal. 283 (58 Pac. Rep. 688). In a suit to foreclose a mortgage where a part only of the debt secured is due, the court properly cannot render a judgment for the part not matured and order an ordinary execution for its enforcement. *Warren v. Harrold*, 92 Tex. 417 (49 S. W. Rep. 364). Wis. Rev. Stat., §§ 3158-3160, regulating the foreclosure of an installment mortgage and a sale of a part of the premises where there has been a default in the payment of some of the installments of the debt, and some are not yet due, require that there shall be an adjudication whether or not the premises can be separated so that only enough thereof can be sold to satisfy the portion of the mortgage which is due, and if so, that the court shall adjudicate how that division shall be made. *Hiles v. Brooks*, 105 Wis. 256 (81 N. W. Rep. 422).

**Sec. 555. Foreclosure proceedings—General principles**

**—Practice.** When a trustee for bondholders refuses to sue for a foreclosure, a single bondholder may maintain an action without the consent of the other bondholders, regardless of the fact that he is actuated by improper motives; nor is his right to do so affected by the fact that the trustee is given power by the mortgage to take possession of and sell the security in case of default. *Louisville & N. R. Co. v. Schmidt*, Ky. (52 S. W. Rep. 835; 21 Ky. Law Rep. 556). As to the jurisdiction of the court of common pleas and the probate court in Ohio of foreclosure proceedings after an assignment by the mortgagor for the benefit of creditors, see *Robinson v. Williams*, 62 O. St. 401 (57 N. E. Rep. 55). A plaintiff in an action to foreclose a mortgage to which one claiming the property under a tax sale is made a defendant, is not required to pay or tender whatever taxes may be just and proper against the land before attacking the title of such defendant. *Mather v. Darst*, 13 S. Dak. 75 (82 N. W. Rep. 407). The want of consideration for a note to secure the payment of which a mortgage is given may be shown by the admissions of the mortgagee. *Saunders v. Dunn*, 175 Mass. 164 (55 N. E. Rep. 893). It is error to decree a joint sale of distinct parcels of property mortgaged to secure several different debts, by different mortgages, for the satisfaction of the aggregate amount of all of the mortgage debts. *Strode v. Miller*, Ida. 59 Pac. Rep. 893). A mortgagee who has included in his mortgage the amount of a prior mortgage, the payment of which he has assumed, cannot recover such amount upon foreclosure unless he has discharged the mortgage. *Manhattan & S. Sav. & L. Ass'n v. Massarelli*, N. J. Eq. (42 Atl. Rep. 284). The right to appeal from that part of a foreclosure decree which directs that the sale shall be made subject to a prior lien, is waived by the mortgagee proceeding to sell the mortgaged premises under the decree. *Male v. Harlan*, 12 S. Dak. 627 (82 N. W. Rep. 179). Construing and applying Cal. Code Civ. Proc., § 726, providing that "there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate," it is held that where one having a right to an equitable mortgage to secure the payment of his claim reduces the claim to a personal judgment against



his debtor without asserting his right to the mortgage, he is barred from afterward asserting such right. *Campan v. Molle*, 124 Cal. 415 (57 Pac. Rep. 208). La. Laws 1878, No. 3 construed and applied—alienation of mortgaged premises pending foreclosure of mortgage. *State v. Rightor*, 51 La. Ann. 1197 (25 So. Rep. 972). Mich. Laws 1899, No. 200, amending How. Ann. Stat., § 6701, providing that a decree for a sale in foreclosure proceedings shall not be entered until after six months from the filing of the bill, instead of one year, as provided in the former statute, and adding a provision that redemption may be made for six months after the sale, amounts simply to a change of remedy and does not impair the obligation of contracts, and applies to foreclosure of mortgages executed before its enactment. *State Sav. Bank v. Mathews*, 123 Mich. 56 (81 N. W. Rep. 918). 21 S. C. Stat. at Large, 816, requiring the establishment of the debt secured by a mortgage by some court of competent jurisdiction as a condition precedent to a sale under the mortgage, unless the amount of the debt shall be consented to in writing by the debtor, applies to mortgages executed before the passage of the statute. *Simon v. Sabb*, 56 S. C. 38 (33 S. E. Rep. 799). 2 N. J. Gen. Stat., p. 2112, which requires that a party who holds a bond, the payment of which is secured by a mortgage, shall foreclose the latter instrument before bringing suit on the former, has no application, where the existence of the mortgage has been terminated before the institution of the suit upon the bond. *Seigman v. Streeter*, 64 N. J. L. 169 (44 Atl. Rep. 888). Objection to an allowance in foreclosure proceedings of the cost of continuing an abstract cannot be raised for the first time on appeal. *Kinsella v. Cahn*, 185 Ill. 208 (56 N. E. Rep. 1119). Minn. Gen. Stat. 1894, § 6032 construed and applied—service of notice of foreclosure by advertisement. *Brigham v. Connecticut Mut. Life Ins. Co.*, 79 Minn. 350 (82 N. W. Rep. 668).

**Sec. 556. Complaint in foreclosure proceedings.** A complaint which does not allege any promise to pay the mortgage debt and does not set out any breach from which such promise can be inferred is fatally defective and is not cured by an allegation that the debt is due and unpaid or by an answer denying that the plaintiff has any lien by virtue of his

mortgage. *Creech v. Abner*, Ky. (50 S. W. Rep. 58; 20 Ky. Law Rep. 1812). An incorrect allegation in a bill to foreclose a mortgage as to how the interest on the note secured was to be paid is cured where the note itself is attached to the bill. *Dorn v. Bissell*, 180 Ill. 73 (54 N. E. Rep. 167). An allegation in a complaint to foreclose a mortgage as to certain defendants that they are claiming an interest in or lien on the mortgaged real estate, and that they have no interest in or lien thereon, and that they be required to set up their claim, is sufficient to authorize a judgment of foreclosure against them, regardless of their personal liability to pay the debt. *Yorn v. Bracken*, 153 Ind. 492 (55 N. E. Rep. 257). Construing and applying Ala. Const., art. 14, § 4, and Laws 1886-88, p. 102, prohibiting a foreign corporation from doing any business in that state without having at least one known place of business and an authorized agent or agents therein, it is held that a bill in foreclosure by such a corporation is insufficient where it fails to state that it had such a place and agent. *Sullivan v. Vernon*, 121 Ala. 393 (25 So. Rep. 600). For particular mistake in description of premises in a complaint to foreclose held to be immaterial, see *Striegel v. Harding*, 12 S. Dak. 342 (81 N. W. Rep. 635; 76 Am. St. Rep. 607).

**Sec. 557. Parties to foreclosure proceedings.** Successive grantees who have assumed the payment of a mortgage are all proper parties to a suit for its foreclosure. *Field v. Thistle*, 58 N. J. Eq. 339 (43 Atl. Rep. 1072). It is not necessary to make the mortgagor, who has conveyed the mortgaged real estate, a party to a proceeding to foreclose the mortgage unless a personal judgment is desired against him, but it is indispensably necessary that the person to whom he has conveyed the mortgaged real estate should be made a party, and if he is not made a party the foreclosure is void, as to him. *Armstrong v. Hufty*, 156 Ind. 606 (55 N. E. Rep. 443). The holder of a tax deed based upon a tax lien prior and superior to a mortgage is not a necessary party to its foreclosure. *Williams v. Cooper*, 124 Cal. 666 (57 Pac. Rep. 577). Applying 21 S. C. Stat. at Large, 816, it is held that the administrator of a deceased mortgagor is a necessary party; but the administrator of one, all of whose heirs are joined as defendants, is not a necessary party, *Simon v. Sabb*,



56 S. C. 38 (33 S. E. Rep. 799); nor is an administrator of a deceased mortgagor a necessary party to a foreclosure where it appears that the entire estate including the mortgaged premises had been disposed of under orders of the probate court and the administration closed, *Browne v. Sweet*, 127 Cal. 332 (59 Pac. Rep. 774). Holders of bonds, to secure which a deed of trust is given, are not necessary parties to a suit to foreclose the deed, where the trustee is a party and it is not made to appear that he is not acting in good faith. *Rumsey v. People's Ry. Co.*, 154 Mo. 215 (55 S. W. Rep. 615). Obligors who give a bond thereby do not acquire an interest in the premises which one of their number individually own, and which he voluntarily mortgaged to the obligee in the bond to secure its payment, so as to make them necessary parties to a bill to compel the redemption of the mortgaged premises to enforce a sale of them. *Raritan Sav. Bank v. Lindsley*, 58 N. J. Eq. 214 (42 Atl. Rep. 574). Construing and applying Utah Rev. Stat. 1898, § 3517, providing that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure sale," it is held that trustees in a deed of trust given to secure debts are not vested with any title, legal or equitable, have no substantial interest in the property, cannot be affected by any decree in the case and are not necessary or indispensable parties to an action to foreclose the deed of trust. *Sidney Stephens Imp. Co. v. South Ogden L. Bldg. & Imp. Co.*, 20 Utah, 267 (58 Pac. Rep. 843).

**Sec. 558. Defenses to foreclosure proceedings.** Where a mortgage is given as security for the payment of a promissory note, it may be shown that the note is without consideration. *Saunders v. Dunn*, 175 Mass. 164 (55 N. E. Rep. 893). An action to foreclose a mortgage brought in violation of the mortgagee's agreement made with the grantee of the mortgagor extending the time for the payment of the mortgage debt, made for a valuable consideration, and with the terms of which such grantee has fully complied, properly may be dismissed. *Seaton v. Fiske*, 128 Cal. 549 (61 Pac. Rep. 666). Where the sole defense of mortgagors in an action to foreclose was payment, the execution of the mortgage being admitted, they cannot object on appeal for the first time

to a finding that they owned the property at the time of the execution of the mortgage, because complainant failed to allege such ownership. *Loomis v. Le Cocq*, 12 S. Dak. 324 (81 N. W. Rep. 633). Upon foreclosure of a purchase money mortgage given to the vendor's wife in consideration of her release of her inchoate right of dower, a debt due from the husband to the mortgagor cannot be pleaded as a set off. *Cole v. Darling*, 123 Mich. 1 (81 N. W. Rep. 967). A grantee in a deed with full covenants who takes possession of the premises at the time of the conveyance, and remains in undisturbed possession, cannot defend an action to foreclose a mortgage executed by him on such premises to secure notes for a portion of the purchase money, on the ground that his grantor had no title to the land. *Falkner v. Hackett*, 104 Wis. 608 (80 N. W. Rep. 940).

**Sec. 559. Usury as a defense to foreclosure proceedings.** Usury is a personal defense and cannot be pleaded by a purchaser of incumbered premises against an incumbrance which he has agreed to pay as part of the purchase price. *Smith v. McMillan*, 46 W. Va. 577 (33 S. E. Rep. 283); *Hiner v. Withlow*, 66 Ark. 121 (49 S. W. Rep. 353; 74 Am. St. Rep. 74); *Building & L. Ass'n v. Walker*, 59 Neb. 456 (81 N. W. Rep. 308); *Building & L. Ass'n v. Bilan*, 59 Neb. 458 (81 N. W. Rep. 308); but a mortgagor's grantee of mortgaged premises is not precluded from setting up a plea of usury against the mortgagee by a recital in his deed that it is "subject to a certain mortgage indebtedness of \$2,000, and interest thereon," *Crawford v. Nimmons*, 180 Ill. 143 (54 N. E. Rep. 209). Where the proof of a usurious bargain does not correspond with the usurious contract set up in the answer, the variance is fatal; and the defendant will not be allowed to remedy it by amendment unless complainant consents to forego the usury. *Richards v. Weingarten*, 58 N. J. Eq. 206 (42 Atl. Rep. 739). Usury cannot be proven by suspicious circumstances, but must be established by clear and indubitable proof. See opinion for particular evidence held insufficient to establish usury. *Short v. Post*, 58 N. J. Eq. 130 (42 Atl. Rep. 569). The fact that the borrower, in addition to the maximum legal rate of interest reserved on a given loan, also paid the attorneys of the lender their fee for examining titles to the land conveyed as security

for the debt, did not render the transaction usurious as to the lender, especially when the latter neither authorized the charge nor shared in the fee. *Gannon v. Scottish-American Mortg. Co.*, 106 Ga. 510 (32 S. E. Rep. 591). Where there is an understanding between the lender of money and his agents whose business it is to procure borrowers that they shall collect their commissions from the borrowers, and such agents collect interest on loans made by them in excess of the legal rate, retaining such excess as their commission, the borrower may recover such usurious interest so paid, from the principal. *Payne v. Henderson*, Ky. (50 S. W. Rep. 34; 20 Ky. Law Rep. 1739). Where a deed of trust given as security for a loan to a corporation having power to accept and execute trusts, required of it the performance of numerous services in reference to the management and disposition of the real estate embraced in the deed and collateral securities given in addition thereto, a provision for payment to it for its services as trustee which does not appear to have been intended as an evasion of the usury law does not make the transaction usurious. *Portland Trust Co. v. Havelly*, 36 Or. 234 (59 Pac. Rep. 466). For an exhaustive review of the history of the law of interest, and collation of authorities on what constitutes usury, see *Union Sav. Bank & T. Co. v. Dottenheim*, 107 Ga. 606 (34 S. E. Rep. 217). For particular transaction held not to be usurious, see *Johnson v. Shattuck*, 67 Ark. 159 (53 S. W. Rep. 888).

**Sec. 560. Usury as a defense to foreclosure proceedings—Agreement by borrower to divide with the lender profit arising from use of loan.** Construing and applying Ia. Code, § 2040, providing that "no person shall, directly or indirectly, receive in money or in any other thing, or in any manner, any greater sum or value for the loan of money, or upon contract founded upon any sale or loan of real or personal property, than is in this chapter prescribed," it is held that an agreement by a borrower to pay the highest legal rate of interest and in addition thereto to divide with the lender profits accruing to him on discounting notes taken up with the money borrowed is usurious. *Weaver v. Burnett*, 110 Ia. 567 (81 N. W. Rep. 771). The court say: "We are also ready to agree with plaintiff's counsel when they say that a loan is free from usury where, in lieu of interest, a share



of the profits expected to be realized by the borrower is agreed bona fide to be given to the lender as compensation for the loan. *Johnston v. Ferris*, 14 Daly, 302; *Goodrich v. Rogers*, 101 Ill. 523. But it is also true that a stipulation for a share of the profits in addition to the principal and legal interest is usurious. *Sweet v. Spence*, 35 Barb. 44. The rule is well stated by Chancellor Walworth in *Colton v. Dunham*, 2 Paige, 269, as follows: 'Whenever, by the agreement of the parties, a premium or profit beyond the legal rate of interest, for a loan or advance of money, is, either directly or indirectly, secured to the lender, it is a violation of the statute, unless the loan or advance is attended with some contingent circumstances by which the principal is put in evident hazard. A contingency merely nominal, with little or no hazard to the principal of the money loaned or advanced, cannot alter the legal effect of the transaction. \* \* \* Where there is a negotiation for the loan or advance of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending; \* \* \* and whatever shape or disguise the transaction may assume, if a profit beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious.' See, also, *Brakeley v. Tuttle*, 3 W. Va. 133; *Cleveland v. Loder*, 7 Paige, 557; *Leavitt v. De Launy*, 4 N. Y. 363; *Browne v. Vredenburg*, 43 N. Y. 195; *Barnard v. Young*, 17 Ves. 44; *Clift v. Barrow*, 108 N. Y. 187 (15 N. E. Rep. 327),—which illustrates the exception stated by Chancellor Walworth. See, also, *Canal Co. v. Vallette*, 21 How. 414 (16 L. Ed. 154)."

**Sec. 561. Statute of limitations—Statutes construed.** A covenant by a grantee of mortgaged premises, by which he assumes to pay the mortgage debt, constitutes a new promise in writing which starts the statute of limitations running anew and of which the mortgagee can avail himself. *Daniels v. Johnson*, 129 Cal. 415 (61 Pac. Rep. 1107; 79 Am. St. Rep. 123). Payments of the interest on a mortgage debt by a grantee of the premises, after the mortgagor's liability on the bond which the mortgage was given to secure had been extinguished by the latter's discharge in bankruptcy, are so necessarily referable to the mortgage that they amount to an acknowledgment that the mortgagor or his grantee held un-



der or by permission of the mortgagee, and the right to foreclose can be barred only by a sufficient lapse of time from the last payment to bar an action in ejectment. *Colton v. Depew*, 59 N. J. Eq. 126 (44 Atl. Rep. 662). The bringing of an action to foreclose by a mortgagee upon default of the mortgagor in the payment of interest, under a stipulation in the mortgage giving him this right, which action subsequently is dismissed upon payment of the interest due by the mortgagor who, and the successors of whom, make subsequent payments of both principal and interest, does not start the statute of limitations to running against the debt from the date of such suit, but the statute in such a case does not begin to run until the principal becomes due according to the terms of the note. *California Sav. & L. Soc. v. Culver*, 127 Cal. 107 (59 Pac. Rep. 292).

In Arkansas an action to foreclose a mortgage cannot be maintained after five years from the maturity of the note which it is given to secure. *Whipple v. Johnson*, 66 Ark. 204 (49 S. W. Rep. 827). When the debt secured by a mortgage is barred the mortgage is also barred; and under Cal. Code Civ. Proc., § 337, an action to foreclose a deed intended as a mortgage is barred in four years from the date of its execution, where it was given to secure a loan presumed to be due immediately or on demand, and was not evidenced by any written promise to pay, *Newhall v. Sherman*, 124 Cal. 509 (57 Pac. Rep. 387). In Florida it is held that seven years adverse possession of land, based upon a paper title, not good as an independent conveyance, but sufficient to constitute a basis of an adverse holding, is not the period of limitation prescribed by the statute to defeat a mortgage claim, but twenty years is the prescribed period, and applies whether the adverse holder claims under title from the mortgagor, or under an independent source of title. *Coe v. Finlayson*, 41 Fla. 169 (26 So. Rep. 704). In Kentucky a mortgage is barred by the statute of limitations when the debt which it is given to secure is barred, and not until then. *Clift v. Williams*, Ky. (49 S. W. Rep. 328; 20 Ky. Law Rep. 1261). In Missouri, prior to Laws 1891, p. 184, notwithstanding a note secured by mortgage is barred, the mortgage may be enforced unless the possession by the mortgagor or his grantee has been adverse to the mortgagee long enough to ripen into a title by adverse possession. *Eyer-*

mann v. Piron, 151 Mo. 107 (52 S. W. Rep. 229). In Wyoming it is held that an action on a mortgage does not become barred until an action on the debt is barred; and Rev. Stat. 1887, § 2366, providing limitations for actions to recover real estate, have no application to an action to foreclose a mortgage. Balch v. Arnold, Wyo. (59 Pac. Rep. 434).

**Sec. 562. Judgment in foreclosure proceedings.** A judgment of foreclosure which fails to state the amount adjudged to be due should be reformed. Gore v. Davis, 124 N. C. 234 (32 S. E. Rep. 554). Defendants to a foreclosure decree who do not appeal therefrom, nor object to a sale thereunder, and pay a deficiency judgment, afterward cannot attack the decree and sale for an irregularity in the service of summons. Bank of Orland v. Dodson, 127 Cal. 208 (59 Pac. Rep. 584; 78 Am. St. Rep. 42). A wife is concluded by a judgment of foreclosure against her and her husband on their note and mortgage from afterwards asserting, in proceedings for a deficiency execution, that she is not liable personally for it. Christian v. Soderberg, 124 Mich. 54 (82 N. W. Rep. 819). A judgment of foreclosure which erroneously orders a sale and conveyance of the property without providing for redemption in accordance with the statute, is erroneous only, and not void, and cannot be assailed successfully in a collateral attack. Ehram v. Smith, 61 Kan. 699 (60 Pac. Rep. 740). Where a decree of foreclosure shows a certificate of summons upon a defendant and that he appeared by an attorney and filed an answer, it cannot be impeached collaterally after third parties have acquired an interest in the property, by the oath of the defendant that he was not duly summoned. Lancaster v. Snow, 184 Ill. 534 (56 N. E. Rep. 813). The record of judicial proceedings showing the foreclosure of a mortgage by the assignee thereof, a purchase of the premises by him, and a receipt for the face of the judgment are not conclusive evidence of payment of the mortgage in an action by him against a third party who guaranteed its payment. Crawford v. Pyle, 190 Pa. St. 263 (42 Atl. Rep. 687). The cestuis que trustent for whom another holds the legal title to lands in trust are not bound by a decree against the latter foreclosing a mortgage on the land given for his own benefit to one who had not



notice of the trust; the same is true of a sale under a decree made to purchasers without notice of the trust. *Geishaker v. Pancoast*, N. J. (43 Atl. Rep. 883).

Sec. 563. **Personal and deficiency judgment upon foreclosure of mortgage—Statutes construed.** Unpaid taxes against property at the time of its purchase under foreclosure sale cannot be included in a deficiency judgment. *Field v. Thistle*, 58 N. J. Eq. 339 (43 Atl. Rep. 1072). The court may determine the personal liability of a surety where this question is raised by the pleadings. *Michigan Trust Co. v. Lansing Lumber Co.*, 121 Mich. 438 (80 N. W. Rep. 281). In order to sustain a deficiency judgment against the purchaser of mortgaged premises on account of his assuming the mortgage, it is not necessary that his personal liability be shown by the petition, it being sufficient for such liability to be disclosed by the answer of the mortgagor. *Graves v. McFarland*, 58 Neb. 802 (79 N. W. Rep. 707). A complaint against the original mortgagors to foreclose a mortgage given to secure their note which asks for a decree and execution for any balance which the sale does not pay is sufficient to support a decree determining the amount due and declaring the defendants to be personally liable for the debt, although such complaint does not contain an allegation that the defendants are so liable. *Simons v. McDonnell*, 120 Mich. 621 (79 N. W. Rep. 916). Applying Ala. Code, § 859, it is held that a claim for decree over for the balance of the mortgage debt left after application thereto of the proceeds of the sale of the mortgaged property, is within the *lis pendens* of every foreclosure suit, and while it is necessary for the plaintiff to move for such decree over after the balance has been fixed and ascertained, no notice of such motion need be given to the defendant. *Wells v. American Mortg. Co.*, 123 Ala. 413 (26 So. Rep. 301). Under this statute a decree for a deficiency properly cannot be rendered until after the sale and confirmation. *Hastings v. Alabama State Land Co.*, 124 Ala. 608 (26 So. Rep. 881). Cal. Code Civ. Proc., § 726, providing for a deficiency judgment in foreclosure proceedings is constitutional. *County Bank of San Luis Obispo v. Goldtree*, 129 Cal. 160 (61 Pac. Rep. 785). Construing and applying Ill. Rev. Stat., ch. 95, § 16, providing that "in all decrees hereafter to be made in suits

in equity directing foreclosures of mortgages, a decree may be rendered for any balance of money that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of such balance, the same as when the decree is solely for the payment of money; and such decree may be rendered conditionally, at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due," it is held that on granting a decree of foreclosure the court properly may determine the liability of the several defendants for any deficiency that may arise, and direct the issuance of execution therefor after its ascertainment, although it is not shown that there is likely to be a deficiency; but such a decree is not final so as to authorize an appeal therefrom until there has been a judicial determination of the amount of the deficiency after the sale. *Eggleston v. Morrison*, 185 Ill. 577 (57 N. E. Rep. 775). Under this statute a personal judgment may be given for a deficiency found to exist after the application of the proceeds arising from a foreclosure sale, although the original decree did not provide for personal liability or a personal decree in case of deficiency. *Springer v. Law*, 185 Ill. 542 (57 N. E. Rep. 435; 76 Am. St. Rep. 57). Proceedings for a deficiency decree after a foreclosure sale, the right to which is given by Mich. Rev. Stat. 1838, p. 376, § 105, are merely supplementary to the original foreclosure, and, where such foreclosure was had on substituted service, may be had on such service. *Field v. Snow*, 124 Mich. 68 (82 N. W. Rep. 798). In Nebraska a personal judgment in foreclosure proceedings does not become final so as to authorize an appeal on account of its erroneous entry until after the sale of the property and entry of judgment for the deficiency. *Parmelee v. Schroeder*, 59 Neb. 553 (81 N. W. Rep. 506). Neb. Laws 1897, ch. 95, repealing Code Civ. Proc., §§ 847, 848, permitting the recovery of deficiency judgment does not affect pending actions. *Thompson v. West*, 59 Neb. 677 (82 N. W. Rep. 13; 49 L. R. A. 337). Under 2 N. J. Gen. Stat., p. 2111, no decree for a deficiency is permitted in a foreclosure suit. *Raritan Sav. Bank v. Lindsley*, 58 N. J. Eq. 214 (42 Atl. Rep. 574). In Ohio where the finding in a decree of foreclosure determines the amount due and there is a balance remaining unpaid after



applying the proceeds of the sale, a suit may be brought on the finding to recover the amount. *Doyle v. West*, 60 O. St. 438 (54 N. E. Rep. 469). Wis. Rev. Stat., § 3162 prescribing the form of a foreclosure judgment, is mandatory, and provides for a personal recovery only by means of a deficiency judgment, and in that case only against the person personally liable. The rendition of a judgment otherwise is erroneous, though where such judgment is in the form of a personal recovery and also authorizes a judgment for a deficiency, where such judgment is proper, the two will be so construed as to give the provision for a personal recovery without a deficiency judgment the effect, only, of a determination of the amount secured by the mortgage. *Duecker v. Goeres*, 104 Wis. 29 (80 N. W. Rep. 91).

**Sec. 564. Allowance of attorney's fees in foreclosure proceedings.** Where the amount of attorney's fees to be allowed is stipulated by the parties in the mortgage or deed of trust, and it does not appear that it was inserted as a cover for usury, or that it was unreasonable or excessive, they are concluded by the amount agreed upon; and such fee properly may be allowed upon foreclosure. *Baker v. Aalberg*, 183 Ill. 258 (55 N. E. Rep. 672); *Baker v. Jacobson*, 183 Ill. 171 (55 N. E. Rep. 724); *Kinsella v. Cahn*, 185 Ill. 208 (56 N. E. Rep. 1119). Ten per cent. of the amount of the indebtedness may be allowed as attorney's fees where the mortgage provides for such allowance, in the absence of evidence that it would be unreasonable. *Thornton v. Commonwealth L. & Bldg. Ass'n*, 181 Ill. 456 (54 N. E. Rep. 1037). Cal. Stat. 1873-74, p. 707, which authorizes a court to fix "the attorney's fee" notwithstanding "any stipulation in the mortgage to the contrary," is held not to authorize the court to allow a fee in excess of the amount stipulated in the mortgage. *Hotaling v. Monteith*, 128 Cal. 556 (61 Pac. Rep. 95). When a mortgage or trust deed contains a provision for a reasonable attorney's fee in case of foreclosure the decree of foreclosure may allow such fee. *Culver v. Brinkerhoff*, 180 Ill. 548 (54 N. E. Rep. 585). An allowance of an attorney's fee based upon evidence that it was a reasonable and customary fee, will not be reversed on appeal where such evidence was uncontradicted in the court below. *Cohn v. Northwestern Mut. Life Ins. Co.*,

185 Ill. 340 (57 N. E. Rep. 38). An allowance of \$100 as attorney's fees for the foreclosure of a mortgage for \$500 was held reasonable. *Bonestell v. Bowie*, 128 Cal. 511 (61 Pac. Rep. 78). Upon foreclosure of a mortgage given to secure a note containing an agreement to pay attorney's fee in case suit is brought it is proper to give the plaintiff judgment for attorney's fees and make such fee a lien upon the mortgaged premises. *County Bank of San Luis Obispo v. Goldtree*, 129 Cal. 160 (61 Pac. Rep. 785). The rule in Kentucky declaring void a stipulation in a contract that the obligor will pay the obligee's attorney's fee in case suit is brought upon it, is held to apply to a stipulation in a mortgage given to a trustee for bondholders to secure payment of bonds, to the effect that the trustee's attorney's fees should be paid out of the proceeds of the property in case of sale, in addition to the debt. *Kentucky Trust Co. v. Third Nat. Bank*, Ky. (50 S. W. Rep. 43; 20 Ky. Law Rep. 1797); *South-ern Warehouse & Transf. Co. v. Mechanics' Trust Co.*, Ky. (56 S. W. Rep. 162; 21 Ky. Law Rep. 1734). Where a copy of a mortgage which provides that upon default of payment the mortgagee or his assigns "may fore-close the mortgage, and may include in such foreclosure a reasonable counsel fee," is attached to and made a part of the complaint for its foreclosure in which it is alleged that the plaintiff has employed an attorney and become liable to him for a reasonable fee, "which said fee is secured by said mortgage," there is a sufficient allegation as to attorneys' fees to support a judgment therefor in favor of the plaintiff. *Cortelyou v. Jones*, Cal. (61 Pac. Rep. 918). Where a mortgage containing a stipulation for the allowance of attorney's fees was executed by a corporation after being submitted to it and in pursuance of a resolution passed by its directors authorizing the execution of a mortgage, "to contain covenants, terms, and provisions set forth in a draft of such mortgage submitted," the corporation cannot object to the allowance of attorney's fees upon foreclosure upon the ground that the resolution authorizing the mortgage did not mention specifically the allowance of attorney's fees. *Hubbard v. University Bank*, 125 Cal. 684 (58 Pac. Rep. 297). Where a second mortgagee seeks to fore-close subject to a prior mortgage without making the prior



mortgagees parties to his bill, or seeking to affect their rights, and the prior mortgagees are permitted to answer the bill, and file a cross bill to foreclose their mortgage, upon foreclosure being decreed a solicitor's fee may be allowed in pursuance of a provision in the prior mortgage, and included in the amount found due thereunder. *Town v. Alexander*, 185 Ill. 254 (56 N. E. Rep. 1111). Only the legal rate of interest should be given on the sum allowed as attorney's fees. *Daggs v. Bolton*, Ariz. (57 Pac. Rep. 611). For exhaustive note on "Constitutionality of statutes allowing an attorney's fee," see 79 Am. St. Rep. 178-185.

**Sed. 565. Appointment of receiver in foreclosure proceedings.** Ordinarily a receiver will not be appointed in a foreclosure suit when the mortgaged property is the homestead of the mortgagor. *Laune v. Hauser*, 58 Neb. 663 (79 N. W. Rep. 555). An order appointing a receiver "to take charge of the fruit crop now standing and growing upon the mortgaged premises described in the complaint herein," should be vacated on motion where the complaint failed to describe the mortgaged premises with sufficient exactness to warrant the imposition of a lien or to justify an order of sale, although the receiver appointed in the meantime has resigned. *Salisbury v. Wilcox*, 128 Cal. 347 (60 Pac. Rep. 979). A receiver appointed in foreclosure proceedings should be discharged when, upon a sale of the premises under the decree of foreclosure, they are bid in for the amount of the decree, interest and costs, whether such bid is made by the holder of the debt or by a third person. *Bogardus v. Moses*, 181 Ill. 554 (54 N. E. Rep. 984). A receiver may be appointed in a real-estate foreclosure proceeding by action after foreclosure sale, and during the period for redemption, for the purpose of collecting rents and profits to protect and preserve the mortgage security, and to protect the mortgaged property from waste, but not to apply such rents and profits to the payment of any deficiency remaining after such sale. *National Fire Ins. Co. v. Broadbent*, 77 Minn. 175 (N. W. Rep. 676). A receivership established by a court appointing a receiver upon the application of a junior mortgagee in an action brought by him to foreclose his mortgage to which a senior mortgagee is made a party,

may be extended to protect the rights of the latter upon application made by him for a receiver. Wyo. Rev. Stat. 1887, § 2935 construed and applied. *Anderson v. Matthews*, 8 Wyo. 513 (58 Pac. Rep. 898). Citing and collating numerous authorities. Where, in an action to foreclose a first mortgage, a second mortgagee files a cross bill and upon his request the court appoints a receiver, adjudicates the amount due on each mortgage and the priority between them, and decrees a sale of the premises which are sold for an amount sufficient to pay the first mortgage, and the sale is confirmed and a deficiency decree given the second mortgagee, the second mortgagee is entitled to a continuance of the receivership for the purpose of collecting and applying on his debt the rents and profits of the premises during the year of redemption. *Roach v. Glos*, 181 Ill. 440 (54 N. E. Rep. 1022). In Kentucky it is held that a junior mortgagee first applying for the appointment of a receiver for the rents and profits of mortgaged premises, under Civ. Code Prac., § 299, is entitled to the benefit of such receivership, although the appointment was made in an action brought by the senior mortgagee whose debt the land was not sufficient to satisfy. *Nesbit v. Wood*, Ky. (56 S. W. Rep. 714). For further construction of Ky. Civ. Code Prac., § 299, see *Mayfield v. Wright*, Ky. (54 S. W. Rep. 864; 21 Ky. Law Rep. 1255). Neb. Code Civ. Proc., § 266 authorizing the appointment of a receiver in an action to foreclose a mortgage when the mortgaged premises "is probably insufficient to satisfy the mortgage debt," does not authorize the appointment of a receiver in case of the debtor's insolvency merely because at some date in the future the property may become insufficient to pay the mortgage. *Laune v. Hauser*, 58 Neb. 663 (79 N. W. Rep. 555). Under this statute a receiver may be appointed on the application of a mortgagee, where the property probably is insufficient to discharge the mortgage debt, regardless of the fact that a deficiency judgment against the parties liable for the debt is collectible. *Waldron v. First Nat. Bank*, 60 Neb. 245 (82 N. W. Rep. 856).

**Sec. 566. Counterclaims and cross bills in foreclosure proceedings.** In an action by a mortgagee to foreclose his mortgage the mortgagor may set up a counterclaim for pur-



chase money due him from the mortgagee on bargain and sale of realty. *Miller v. Hunt*, Ida. (57 Pac. Rep. 315). One made a party to an action to foreclose a mortgage under a general allegation that he claims some adverse interest which is inferior to the plaintiff's lien, by a cross complaint may set up a legal title to the premises involved and have it determined in the action. *Bal. Ann. Wash. Codes & Stat.*, § 4913a construed and applied. *Hanna v. Reeves*, 22 Wash. 6 (60 Pac. Rep. 62). Where foreclosure is sought upon certain land described in the complaint, and a cross complaint is filed, asking foreclosure upon part of said land and asking priority, and foreclosure is granted on the cross complaint, and priority given, a decree ordering a sale of all the land described in the complaint, the proceeds to be applied first on the debt mentioned in the cross complaint, and second on the debt mentioned in the complaint, should be so modified as to direct first a sale of the lands described in the cross complaint, and application of the proceeds on the debt therein mentioned, balance, if any, to be applied on the debt described in the complaint, and second, if the debts be not then fully satisfied, a sale of the property in the complaint described. *Sidney Stephens Imp. Co. v. South Ogden Land & Imp. Co.*, 20 Utah, 267 (58 Pac. Rep. 843).

**Sec. 567. Adjudication of adverse claims of third parties in foreclosure proceedings.** A wife made a party to proceedings to foreclose a mortgage on her husband's lands, to answer generally, is not estopped by a decree rendered by default against her from subsequently setting up her inchoate interest in the mortgaged lands, as against his judgment creditors who were made defendants to the action, where her interests in the lands were not specifically put in issue by any pleading filed in the case. *Clements v. Davis*, 155 Ind. 624 (57 N. E. Rep. 905). In California it is held that a title claimed by a third person which is paramount and hostile to that of both the mortgagor and mortgagee, cannot be litigated in an action to foreclose the mortgage. *Murray v. Etchepare*, 129 Cal. 318 (61 Pac. Rep. 930). In discussing this question the supreme court of that state, in the case of *Beronio v. Ventura County Lum. Co.*, 129 Cal. 232 (61 Pac. Rep. 958; 79 Am. St. Rep.

118), say: "The object of a suit for the foreclosure of a mortgage is to subject to a judicial sale, and vest in the purchaser thereunder, the same title or estate in the mortgaged property which the mortgagor had at the time of the execution of the mortgage, and the only proper or necessary parties defendant to such suit are the mortgagor, and those who claim an interest in the property derived subsequent to the date of the mortgage. Titles adverse to that of the mortgagor, or superior to that covered by the mortgage, are not proper subjects for determination in the suit. Jones, Mortg. § 1589; Wilt. Forec. §§ 191, 192; McComb v. Spangler, 71 Cal. 418 (12 Cal. 347). Whenever it is made to appear that the interest of a defendant is adverse or superior to that covered by the mortgage, the proper action of the court is to dismiss him from the suit. Ord v. Bartlett, 83 Cal. 428 (23 Pac. Rep. 705); Cody v. Bean, 93 Cal. 578 (29 Pac. Rep. 223); Hoppe v. Hoppe, 104 Cal. 94 (37 Pac. Rep. 894). If, however, the plaintiff makes the holder of an adverse title a party defendant to the foreclosure suit, setting forth facts from which he claims that such title is subordinate to his mortgage, and issues upon these facts are presented for adjudication without objection on the part of the defendant, the judgment of the court thereon will not be void. The court may decline to pass upon the question, as not germane to the suit for foreclosure, or it may determine that such claim of the defendant is unfounded, or that his interest in the premises is subordinate to the mortgage, or it may render a decree of foreclosure, subject to the prior right of such defendant. The subject-matter of such controversy will be within the jurisdiction of the court, and, if the parties thereto submit the controversy to its determination, the judgment thus rendered will be as conclusive upon them as if rendered in an action specially brought for that purpose, and will not be subject to collateral attack. Helck v. Reinheimer, 105 N. Y. 470 (12 N. E. Rep. 37); Goebel v. Iffla, 111 N. Y. 170 (18 N. E. Rep. 649); Cromwell v. MacLean, 123 N. Y. 474 (25 N. E. Rep. 932). Under the usual allegation in a complaint for foreclosure, that a defendant other than the mortgagor claims some interest in the premises, and that such interest is subsequent and subordinate to that created by the mortgage, any prior interest held by such defendant is not af-



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fect by the judgment therein. Such averment is not material to the plaintiff's cause of action, nor is it an issuable fact; and whether the court rendered judgment upon the default of the defendant, or upon an issue created by a denial of this averment, without setting forth the character of his interest, any prior interest held by him is not affected by such judgment. *Lewis v. Smith*, 9 N. Y. 502 (61 Am. Dec. 706); *Frost v. Koon*, 30 N. Y. 428; *Smith v. Roberts*, 91 N. Y. 470; *Payn v. Grant*, 23 Hun. 134; *Elder v. Spinks*, 53 Cal. 293; *Sichler v. Look*, 93 Cal. 600 (29 Pac. Rep. 220)."

**Sec. 568. Foreclosure against deceased mortgagor—Filing claim against estate.** In Arkansas it is held that a mortgagee who has probated his claim against his deceased mortgagor's estate cannot be compelled by unsecured creditors of the estate first to foreclose his mortgage before sharing in a pro rata distribution among creditors, ordered by the court. *Lofland v. Cowger*, Ark. (57 S. W. Rep. 797). In California, unless it appears that the mortgaged premises were selected and declared a homestead prior to the mortgagor's death, the presentation of the mortgage debt against the estate is not required. *Browne v. Sweet*, 127 Cal. 332 (59 Pac. Rep. 774). Where, upon the death of a mortgagor whose mortgage in fact was of no validity because executed on land in which he never had any interest whatever, the mortgagee procures an allowance in his favor against the mortgagor's estate of the amount of the mortgage debt as an unsecured claim, such an allowance is not void, under Cal. Code Civ. Proc., § 726, providing that there can be but one action for recovering any debt secured by mortgage upon real estate, which must be by foreclosure proceedings. *Otto v. Long*, 127 Cal. 471 (59 Pac. Rep. 895). Construing and applying Code Civ. Proc., §§ 1493, 1497, 1569, 1570, it is held that a mortgagee of lands of a decedent who procures an allowance of the indebtedness due him without placing any reliance upon his mortgage and making only incidental reference thereto, and who afterward purchases the premises at an executor's sale made under an order of court, is not entitled to have the price applied in satisfaction of his mortgage. *In re Turner's Estate*, 128 Cal. 388 (60 Pac. Rep. 967). Under Colo. Laws 1885, p. 395, as amended by Laws 1889, p. 474, cred-

itors of a decedent whose claims are secured by a mortgage are not allowed to foreclose such mortgage within one year from his death, "and in no event until their debts or claims have been first proved and allowed" by the county court; and a foreclosure sale made by a mortgagee in violation of this statute, although under a power of sale contained in his mortgage, is void. *Lewis v. Hamilton*, 26 Colo. 263 (58 Pac. Rep. 196). Nev. Comp. Laws 1900, §§ 2893-2896, requiring the filing of claims against a decedent's estate and the attaching of a certified copy of mortgage securing the claim, and § 2943, providing that in case of an administrator's sale of lands subject to a mortgage the proceeds first shall be applied to its extinguishment, are held not to require the presentment of a mortgage indebtedness to the administrator for allowance as a claim against the estate as a condition to foreclosure. *Kirman v. Powning*, Nev. (60 Pac. Rep. 834). 2 N. J. Gen. Stat., p. 2112, pl. 47; p. 2368, pl. 63 construed and applied—disputed claim—action on bond before foreclosure. *Weatherby v. Sparks*, 63 N. J. L. 445 (43 Atl. Rep. 683).

**Sec. 569. Rights of junior incumbrancers.** A junior mortgagee made a defendant to an action to foreclose mortgages on certain lands may, by cross bill, assert his rights to the same lands under mortgage from one of the mortgagors, and also have adjudicated his rights under a mortgage by the same mortgagor on other lands securing the same debt to him, not included in the mortgage to plaintiff. Cal. Code Civ. Proc., §§ 442, 726 construed and applied. *Stockton Sav. & L. Soc. v. Harrold*, 127 Cal. 612 (60 Pac. Rep. 165). A junior incumbrancer, who claims priority over an elder equitable lien, must allege and prove that he acted in good faith in the transaction, and that he paid out the full amount secured by his lien, in ignorance of the prior equity. *Upton v. Betts*, 59 Neb. 724 (82 N. W. Rep. 19). The equity of redemption of a junior mortgagee is not barred by an action to foreclose a senior mortgage to which he was not made a party. *Citizens' State Bank v. Julian*, 153 Ind. 655 (55 N. E. Rep. 1007).

**Sec. 570. Marshalling securities—Rule where portions of the mortgaged premises have been conveyed.** The rule

that where a mortgagor successively sells portions of the mortgaged premises, any portion retained by him shall be sold first and the alienated portions in the inverse order of their alienation, is adhered to in Nebraska. *Bradfield v. Sewell*, 58 Neb. 637 (79 N. W. Rep. 615). The rule applies in favor of a grantee in a warranty deed, although its consideration was one dollar and love and affection; and the application of the rule is not affected by the fact that the mortgagor after a conveyance of a part of the premises executed a second mortgage on the part retained by him to the owner of the original mortgage, where he took with notice of the conveyance. *Howser v. Cruikshank*, 122 Ala. 256 (25 So. Rep. 206). The rule does not apply to voluntary conveyances. *Steinmeyer v. Steinmeyer*, 55 S. C. 9 (33 S. E. Rep. 15). The rule does not apply to the case where tenants in common jointly mortgage the common property for a joint debt, and one of them subsequently sells and conveys his entire interest to another person, subject to the incumbrance; but in such case the whole property is still liable for the entire debt, and one tenant in common cannot charge the whole joint debt primarily upon the interest of the other tenant in common by selling and conveying his own interest. *Walker v. Sarven*, 41 Fla. 210 (25 So. Rep. 885). Minor heirs of a subsequent grantee of a portion of mortgaged premises cannot complain of the action of the mortgagee in disregarding their equitable rights by selling the whole of the premises and purchasing the same himself, where it is not shown that he had any notice of the conveyance which gave them the equitable right to have the portion of the premises not conveyed first sold in satisfaction of the debt. *Pitts v. American Freehold Land-Mortg. Co.*, 123 Ala. 469 (26 So. Rep. 286).

**Sec. 571. Appraisement of property—Nebraska cases.**

But one appraisement is required to be made until the property has been twice advertised and twice offered for sale. *Scottish-American Mortg. Co. v. Nye*, 58 Neb. 661 (79 N. W. Rep. 553). *Kampman v. Nicewaner*, 60 Neb. 208 (82 N. W. Rep. 623). The owner of property about to be sold is not entitled to notice of the time and place of making the appraisement. *Eastern Banking Co. v. Seeley*, 59 Neb. 676 (81 N. W. Rep. 852); *Green v. Paul*, 60 Neb.

7 (82 N. W. Rep. 98). An appraisalment is not vitiated by reason of the fact that the deputy sheriff assisted in making it. *Scottish-American Mortg. Co. v. Nye*, 58 Neb. 661 (79 N. W. Rep. 553). The correctness of an appraisalment cannot be questioned after a foreclosure sale, except for fraud. *Security Inv. Co. v. Sizer*, 58 Neb. 669 (79 N. W. Rep. 554); *Scottish-American Mortg. Co. v. Nye*, 58 Neb. 661 (79 N. W. Rep. 553); *Bernheimer v. Hamer*, 59 Neb. 733 (82 N. W. Rep. 18). A sale will not be vacated on the ground of the appraisalment being too low, unless the actual value so greatly exceeds the appraised value as to raise the presumption of fraud in making the appraisalment. *Green v. Paul*, 60 Neb. 7 (82 N. W. Rep. 98). Particular evidence held insufficient to show an appraisalment to be so low as to be presumptively fraudulent. *Woolworth v. Parker*, 60 Neb. 142 (82 N. W. Rep. 317). The owner of the equity of redemption of real estate cannot be heard to object to the confirmation of the sale on the ground that prior liens against the property were not deducted by the appraisers in making the appraisalment. *Green v. Paul*, 60 Neb. 7 (82 N. W. Rep. 98). An error in appraising real estate for judicial sale, whereby an outlawed lien was deducted, is without prejudice where the property sold for more than two-thirds its gross valuation. *Bernheimer v. Hamer*, 59 Neb. 733 (82 N. W. Rep. 18). Where no attack has been made on an appraisalment of property for the purpose of a judicial sale, an order setting aside such appraisalment is unauthorized. *Kampman v. Nicewaner*, 60 Neb. 208 (82 N. W. Rep. 623).

**Sec. 572. Notice of sale—Sale in parcels.** A mistake in the advertisement of a sale under a third mortgage giving the amount due on previous mortgages as too large a sum does not affect the rights of purchasers in good faith, for a valuable consideration, after foreclosure, and without any actual or constructive knowledge of the error. • *Way v. Dyer*, 176 Mass. 448 (57 N. E. Rep. 678). Ill. Rev. Stat., ch. 77, § 14 requiring the posting of written or printed notices of an execution sale does not apply to a sale made by a master under a decree in foreclosure. *Springer v. Law*, 185 Ill. 542 (57 N. E. Rep. 435; 76 Am. St. Rep. 57). *Sand. & H. Ark. Dig.*, §§ 3095, 3096, prescribing the notice



and place of execution sales, do not apply to sales made under a mortgage foreclosure by the court through a commissioner. *Farnsworth v. Hoover*, 66 Ark. 367 (50 S. W. Rep. 865). In California a defendant who desires the property sold in separate parcels should make application therefor as required by Code Civ. Proc., § 694. *County Bank of San Luis Obispo v. Goldtree*, 129 Cal. 160 (61 Pac. Rep. 785). Cal. Code Civ. Proc., § 694 construed and applied—right of judgment debtor to direct order of sale—sale of land in parcels or as a whole. *Connick v. Hill*, 127 Cal. 162 (59 Pac. Rep. 832).

**Sec. 573. Application of proceeds of foreclosure sale.** Proceeds in the hands of a receiver appointed in foreclosure proceedings arising from his sale of the mortgaged property are charged with all the priorities and equities which existed as against the property, although they are not specially adjudicated by the decree. *Mueller v. Stinesville & B. Stone Co.*, 154 Ind. 230 (56 N. E. Rep. 222). When different notes or bonds secured by a mortgage become due at different times, and it is provided by it that, if default be made in the payment of any one of the demands when it becomes due, the trustee therein named may proceed to foreclose the mortgage and sell the property, and he does so, and it brings more than a sufficient amount to pay the debt for which it is sold, a court of equity will take hold of the fund, and administer it according to the rights of the holders of all the securities, whether the proceeding be by foreclosure or on creditors' bill. *Rumsey v. People's Ry. Co.*, 154 Mo. 215 (55 S. W. Rep. 615). Citing, *Railroad Co. v. Fosdick*, 106 U. S. 47 (1 Sup. Ct. Rep. 10; 27 L. Ed. 47); *Olcutt v. Bynum*, 17 Wall. 44 (21 L. Ed. 570); *Noonan v. Lee*, 2 Black, 499 (17 L. Ed. 278). Where a master sells property under a decree of foreclosure for more than sufficient to pay the decree, and the decree does not authorize him to sell subject to prior incumbrances, and prior incumbrancers are not parties to the foreclosure suit, and after the sale, but before payment of the purchase money, it is discovered that there are prior incumbrances upon the property, and the purchaser, prior incumbrancer, mortgagee and master, without the consent of the defendant in foreclosure, and without an order of the

court to that effect, agree that a sufficient amount of the purchase money be paid over to such prior incumbrancer to satisfy his claim, and the surplus only is credited upon the foreclosure decree, and this action of the parties is never ratified by the mortgagor or the court, and no judgment for deficiency is ever entered against the mortgagor, the mortgagee has no standing upon which to enforce a claim for a balance asserted by him to be due upon his decree. *Watson v. Jones*, 41 Fla. 241 (25 So. Rep. 678). A street railway is within the reason of the rule of a court of equity which subjects proceeds of mortgaged railway property in the hands of a receiver to the payment of current debts made in the ordinary course of business, if there has been any diversion of the current receipts to increase the value of the security, but in order for the rule to apply it must appear that the additions to the mortgaged property increasing its value were paid for out of the current earnings of the company. *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 291 (55 N. E. Rep. 745; 48 L. R. A. 41).

**Sec. 574. Validity of foreclosure sales—Setting aside.**

After a mortgage sale it is too late for the mortgagor to object that adjournments of the sale were not advertised properly, where such adjournments all were made at the request of one who represented the mortgagor and who consented to the notices in the form in which they were given without making any objection. *Way v. Dyer*, 176 Mass. 448 (57 N. E. Rep. 678). If a sale, pursuant to a judgment of foreclosure of a mortgage, be set aside because of a clerical mistake therein, and a resale be ordered, a judgment for a deficiency rendered pursuant to the report of the first sale should be set aside, because the remedy for the collection of the mortgage indebtedness by a sale of the entire mortgaged property must be exhausted as a condition precedent to such a judgment. *Bostwick v. Van Vleck*, 106 Wis. 387 (82 N. W. Rep. 302). A court of equity, when justice requires it, and its powers are seasonably invoked, may vacate an order confirming a judicial sale, and discharge the purchaser, who has become such through fraud, accident or mistake. *Kampman v. Nicewaner*, 60 Neb. 208 (82 N. W. Rep. 623). The court say: "Foreclosure sales are made by the court, which is always fair



and just to those with whom it deals. It is not bound to hold purchasers to the performance of unconscionable contracts, or any contract which has been entered into through a venial error, especially if the rights of third parties have not intervened, and the litigants are left where they were before. The fact that there has been a confirmation of the sale is not at all important. That is an adjudication touching only the regularity of the proceedings under the order of sale. It has no relation to such grounds for equitable relief as were unknown to the parties and to the court at the time the order of confirmation was entered. *Taylor v. Courtney*, 15 Neb. 190 (16 N. W. Rep. 842); *McKieghan v. Hopkins*, 19 Neb. 33 (26 N. W. Rep. 614)." For particular fact cases illustrating the power of courts to set aside foreclosure sales, see *Veit v. Meyer*, 105 Wis. 530 (81 N. W. Rep. 653); *John Paul Lumber Co. v. Neumeister*, 106 Wis. 243 (82 N. W. Rep. 144).

**Sec. 575. Confirmation and conveyance.** An objection to the confirmation of a sale cannot be made for the first time on appeal. *Pearson v. Badger Lum. Co.*, 60 Neb. 167 (82 N. W. Rep. 374). A court properly may refuse to confirm a foreclosure sale upon it being shown that the property was subject to a prior incumbrance equal to more than half of the purchaser's bid, where he made the purchase under the honest belief, in which he was justified, that the property was free from incumbrances. *Kremer v. Rudolph*, 105 Wis. 534 (81 N. W. Rep. 654). Where a certificate of sale is issued by an officer of a court, such as the master in chancery, that officer, on notice, is before the court at all times, and may, by the chancellor, be compelled to discharge his duty in a summary proceeding to be heard before the chancellor; and such summary proceeding is a proper remedy to be resorted to to compel the execution of a deed under a certificate of sale, where one is entitled to such deed, and not a resort to a proceeding by mandamus. *Bethmann v. Bowman*, 181 Ill. 421 (55 N. E. Rep. 148; 72 Am. St. Rep. 265). *Okla. Code Civ. Proc.*, § 473 construed and applied—proceedings for confirmation of sale. *Payne v. Long-Bell Lumber Co.*, 9 Okla. 683 (60 Pac. Rep. 235).

**Sec. 576. Title, rights and liabilities of purchaser.**

The title of a plaintiff purchasing at his own foreclosure sale is avoided by a subsequent reversal of the decree under which the sale was made. Ind. Rev. Stat. 1894, § 681 (Rev. Stat. 1901, § 681) construed and applied. *Butler v. Thornburg*, 153 Ind. 530 (55 N. E. Rep. 417). Purchasers at a sale made under a decree foreclosing a mortgage executed by one for his own benefit on lands, the legal title to which he held in trust for others, take subject to the rights of his cestuis que trustent, although purchasers or the original mortgagee had no knowledge of the trust. *Geishaker v. Pancoast*, N. J. (43 Atl. Rep. 883). A lessee from the grantor in a security deed, which has been duly filed and recorded, can be dispossessed in a summary way by the sheriff for the purpose of placing in possession a purchaser of the property at a sale had under a judgment setting up a special lien upon the same, rendered in a suit by the creditor on the debt secured by such deed, notwithstanding the lease may be older than the judgment under which the sale was had. *Mattlage v. Mulherin*, 106 Ga. 834 (32 S. E. Rep. 940). Minn. Gen. Stat. 1894, §§ 6066, 6072 construed and applied—right of purchaser to have execution for recovery of premises. *Belknap v. Van Riper*, 76 Minn. 268 (79 N. W. Rep. 103).

**Sec. 577. Power of sale—Assignment or delegation of.**

An assignment of a mortgage having a power of sale to an attorney for the purpose of foreclosure does not pass to his administrator the right to exercise such power. *Taylor v. Carroll*, 89 Md. 32 (42 Atl. Rep. 920; 44 L. R. A. 479). The assignee of an executor, appointed in another state, of a mortgagee of lands in Minnesota, containing a power of sale to the mortgagee, his heirs, executors, administrators, and assigns, may exercise the power without first filing in the office of the register of deeds of the county where the foreclosure is to be commenced an authenticated copy of the appointment of his assignor as executor. He had that power in the absence of any statute, and the proviso to Gen. Stat. 1894, § 6053, does not apply; that section being, by its plain language, limited to the exercise of the power by the executor himself. *Cone v. Nimocks*, 78 Minn. 249 (80 N. W. Rep. 1056). A mortgagee with a power of sale in

his mortgage cannot turn over the mortgage to a third person and delegate to him the power to select the time and place of sale, and make the sale, without his immediate supervision and control. *Green v. Stevenson*, Tenn.

(54 S. W. Rep. 1011). The court say: "The authorities are practically unanimous that a trustee or mortgagee, invested with power to sell under a mortgage or deed of trust to secure debts, cannot appoint an agent to make the sale, unless the authority to make such an appointment is granted in the instrument. The reason, in short, is that the mortgagee or trustee invested with power to sell is selected by the grantor because of his confidence in his integrity and discretion, and of his belief that he will, in making the sale, protect his interest. *Perry, Trusts*, §§ 287, 402, 499, 602m, 602x, 779, 780; *Hill, Trustees*, 175; *Graham v. King*, 50 Mo. 22 (11 Am. Rep. 401); *Powell v. Tuttle*, 3 N. Y. 396; *Fuller v. O'Neal*, 69 Tex. 349 (6 S. W. Rep. 181; 5 Am. St. Rep. 59); *Woddrop v. Weed*, 154 Pa. St. 307 (26 Atl. Rep. 375; 35 Am. St. Rep. 832); 27 Am. & Eng. Enc. Law (1st Ed.), p. 143, notes, and cases cited." A subsequent deed by a mortgagee to the purchaser at a sale had under a power in the mortgage which sale turns out to be invalid, conveys to him merely the mortgagee's right and lien on the land. *Green v. Stevenson*, Tenn.

(54 S. W. Rep. 1011).

**Sec. 578. Power of sale—Sale under.** A power of sale in a mortgage given to secure a debt in part usurious may be exercised, at least, to the extent of collecting the principal, with lawful interest; certainly so when it is exercised with the acquiescence of the mortgagor. When such a mortgage secures a debt maturing by installments, and the parties by a written agreement substitute a new amount for the total indebtedness, which relieves the transaction of usury, and fix the time for its payment on a given day, if payment be not then made the power of sale may be exercised. Where such power authorizes the mortgagee to convey the premises to the purchaser as attorney in fact for the mortgagor, but the mortgagee conveys in his own name, it does not pass a legal title, but if, in other respects, properly executed, passes an equitable title, which constitutes a good defense, so far as damage to the freehold is

concerned, to an action brought by the wife of the mortgagor, whose sole interest in the property is under a voluntary conveyance from her husband, made after the execution of the mortgage. *Moseley v. Rambo*, 106 Ga. 597 (32 S. E. Rep. 638). A mortgagee does not lose his right to have a sale of his deceased mortgagor's land under a power of sale contained in a mortgage, by a delay occasioned by his negotiating with the mortgagor's executrix, during which she, in violation of arrangements made with the mortgagee, commenced judicial proceedings to sell the land. *Mish v. Lechliden*, 89 Md. 275 (43 Atl. Rep. 57). A grantor in a security debt to two grantees embracing a power of sale who has failed to pay the debt to secure which the deed was given, cannot enjoin the exercise of the power because one or both of the grantees may be indebted on an open account to him in a sum nearly or quite equal to the amount of the debt, no allegation of their insolvency being made. *McDaniel v. Cowart*, 109 Ga. 419 (34 S. E. Rep. 589). A provision in a power of sale requiring the posting of written notices of a sale thereunder in at least three public places in the county, does not require the posting of a notice on the premises, but leaves the selection of the places for posting such notices with the mortgagee. *McClendon v. Doe*, 122 Ala. 384 (25 So. Rep. 30). Md. Code Pub. Loc. Laws, art. 4, § 702; Pub. Gen. Laws, art. 66, § 8 construed and applied—publication of notice of foreclosure sale under power. *Knapp v. Anderson*, 89 Md. 189 (42 Atl. Rep. 933). Equity will set aside a sale by a mortgagee under a power, made after the debt has been paid. *Liddell v. Carson*, 122 Ala. 518 (26 So. Rep. 133). A sale by a mortgagee under a power will be set aside where it does not clearly appear that the debt had been rendered due by demand by him in accordance with the stipulations of the note secured by the mortgage. *Fenley v. Cassidy*, R. I. (43 Atl. Rep. 206). An open and fair sale at which the land brings a fair price made on the premises in the presence of all the parties interested without objection will not be held invalid because not made at the court house door, where the power of sale failed to specify the place of sale. *Jenkins v. Daniel*, 125 N. C. 161 (34 S. E. Rep. 239; 74 Am. St. Rep. 632).

**Sec. 579. Sale under power—Purchase by mortgagee.**

In Arkansas the legal title passes by a mortgage to the mortgagee, and where he purchases the property at a foreclosure sale under a power contained in the mortgage he has the right to possession during the year allowed the mortgagor for redemption, there being no statute giving the latter this right. *Vaughan v. Walton*, 66 Ark. 572 (52 S. W. Rep. 437). After a delay of four years it is too late for a mortgagor to elect to disaffirm a sale on account of his mortgagee purchasing thereunder. *Mason v. American Mortg. Co.*, 124 Ala. 347 (26 So. Rep. 900).

**Sec. 580. Deed of trust to secure debts—Foreclosure.**

A grantor in a deed of trust to secure the payment of a debt cannot impeach or disparage his own title to prevent a sale under such trust. *Martin v. Kester*, 46 W. Va. 438 (33 S. E. Rep. 238). A trustee in a deed of trust who has accepted the trust may resign or permanently remove without the consent or request of any one, either before or after default. *Miller v. Williams*, 27 Colo. 34 (59 Pac. Rep. 740). The fact that a trust deed does not authorize a foreclosure by the summary proceeding of a sale by the trustee until the entire debt has matured, does not prevent the mortgagee from seeking foreclosure by suit on account of default in the payment of interest, although the principal of the debt is not yet due. *Warren v. Harrold*, 92 Tex. 417 (49 S. W. Rep. 364). The legal holder and owner of obligations secured by a deed of trust may bring an action for its foreclosure, although it provides that in case of default "the grantee or his successor in trust" may file a bill to foreclose "in his own name or otherwise." *Dorn v. Colt*, 180 Ill. 397 (54 N. E. Rep. 167). A trust deed given by a domestic corporation to secure its bonds is not rendered invalid and its foreclosure cannot be prevented by the fact that the trustee named therein is a foreign corporation which has not complied with the laws of the state in which the property is situated so as to qualify it to perform the active duties of the trust, no act having been performed by it except to certify the bonds and it having joined with the bondholders in a suit to foreclose the deed in a court having jurisdiction of the premises. *Morse v. Holland Trust Co.*, 184 Ill. 255 (56 N. E. Rep. 369). A



trustee in a deed of trust is a necessary party to an action for its foreclosure. *Moyse v. Cohn*, 76 Miss. 590 (25 So. Rep. 169). Construing and applying Utah Rev. Stat. 1898, § 3517, providing that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure sale," it is held that trustees in a deed of trust given to secure debts are not vested with any title, legal or equitable, have no substantial interest in the property, cannot be affected by any decree in the case and are not necessary or indispensable parties to an action to foreclose the deed of trust. *Sidney Stephens Imp. Co. v. South Ogden L., Bldg. & Imp. Co.*, 20 Utah, 267 (58 Pac. Rep. 843).

**Sec. 581. Sale under deed of trust.** A beneficiary under a deed of trust to secure a debt may make a valid bid at a sale by the trustee by directing him by letter to bid in behalf of the beneficiary a certain named sum. *Springfield Engine & Thresher Co. v. Donovan*, 147 Mo. 622 (49 S. W. Rep. 500). A trustee in a deed of trust requiring the property to be sold by public auction, where he has offered the property at public sale at which he has received three bids, upon failure of the two highest bidders to comply with their bids, may upon parol authority from the owner sell the property at private sale to the next highest bidder. *Cockrill v. Whitworth*, Tenn. (52 S. W. Rep. 524). A sheriff acting in the place of the trustee in a deed of trust in making a sale thereunder pursuant to a provision in the deed of trust that in case of the trustee's inability or refusal to act, the sheriff might proceed to foreclose by sale, acts in his individual and not his official capacity and has no authority to bind a bidder by any memorandum he may make. *Dunham v. Hartman*, 153 Mo. 625 (55 S. W. Rep. 233; 77 Am. St. Rep. 741).

**Sec. 582. Sale under deed of trust—Setting aside.** A trustee, with a power of sale, in a deed of trust executed on land by a purchaser thereof at a sale under a previous trust deed, is a necessary party to a suit to set aside such sale. *Markwell v. Markwell*, 157 Mo. 326 (57 S. W. Rep. 1078). A purchaser at a sale under a deed of trust acquires

no title where he has notice at the time of the sale that the debt the deed was executed to secure had been paid. *Wells v. Estes*, 154 Mo. 291 (55 S. W. Rep. 255). The mere fact that land brings about one-third of its value is not such inadequacy of price as will justify the setting aside of the sale upon that ground alone; and where property is described in a deed of trust as a single parcel, the mere failure of the trustee to offer it for sale in parcels will not invalidate his sale, *Markwell v. Markwell*, 157 Mo. 326 (57 S. W. Rep. 1078). A trustee making a sale of platted lots under a deed of trust, who announces that he will receive bids on the lots separately or en masse, may sell the property en masse to one whose bid exceeds the aggregate of the separate bids. *Lazarus v. Caesar*, 157 Mo. 199 (57 S. W. Rep. 751). A provision in a deed of trust embracing several tracts of land which requires them to be sold in bulk in case of default is valid, and a sale made accordingly cannot be set aside upon the ground that more could have been realized if the land had been sold in parcels or because such stipulation was consented to on account of the creditor having an advantageous position over the debtor at the time of the execution of the deed. *Dunn v. McCoy*, 150 Mo. 548 (52 S. W. Rep. 21). A sale under a deed of trust which stipulates that a sale thereunder should be for cash, at which the terms of the sale are announced as strictly cash on the day of sale, is not avoided by a previous agreement between the purchaser and the beneficiary under the deed by which the latter is to give such purchaser time on that part of the proceeds of the sale belonging to the beneficiary, where the purchaser paid the balance of his bid in cash. *Marlin v. Sawyer*, Tenn. (57 S. W. Rep. 416). A trustee in a deed of trust, being the trusted agent of both the debtor and creditor, in the sale of property, must use all reasonable efforts and methods to make it bring as much as possible, and he should be fair and impartial as between the debtor and creditor; hence a bill by the debtor alleging that the trustee, for the purpose of enabling the holder of the note secured by the deed of trust, to buy the land as cheaply as possible, divided the land and offered it for sale in its most unsalable form and the sale was made to the holder of the note for much less than the land should have brought had the sale been conducted properly and

fairly, entitles the plaintiff to some form of relief, the facts being true, although the purchaser offered to allow him to redeem. *Axman v. Smith*, 156 Mo. 286 (57 S. W. Rep. 105). A debtor who has long been delinquent and who made no attempt to get money with which to redeem his property from a trust deed until three days before a sale thereunder, cannot have such sale set aside on the ground of accident or surprise existing merely on account of his failure to get the money within the time limited, through being unable to find the person who had agreed to make the necessary loan to him; nor will the refusal of the trustee to postpone the sale for two days in such a case be sufficient ground for setting it aside, there being no reasonable assurance that the debtor could raise the money. *Dunn v. McCoy*, 150 Mo. 548 (52 S. W. Rep. 21).

**Sec. 583. Building and loan association mortgages.**

The statutes of New York empowering a building and loan association to take as security for its loans second mortgages, when the second mortgage to the association is given in sum sufficient to cover any first mortgage that may be a lien upon the property in addition to that of the association, authorizes the association to assume the payment of the first mortgage as a part of the consideration of the second. *Manhattan & S. Sav. & L. Ass'n v. Massarelli*, N. J. Eq. (42 Atl. Rep. 284). Fines assessed by a building and loan association against a borrowing member for non-payment of monthly installments after the filing of the bill of foreclosure by the association, cannot be recovered by it, as the beginning of the foreclosure proceedings terminates the member's right to make such payments. *Manhattan & S. Sav. & L. Ass'n v. Massarelli*, N. J. (42 Atl. Rep. 284). A building and loan association taking a mortgage payable in fixed monthly installments and stipulating that the mortgagor shall not be required to make such monthly payments for a greater period than seventy-eight months from the date of the mortgage, will not be allowed to assert that the contract was ultra vires after the mortgagor has fully performed his part of it, where there is no statute forbidding such a contract. *International Bldg. & L. Ass'n v. Bratton*, 24 Ind. App. 654 (56 N. E. Rep. 105).



**Sec. 584. Building and loan association mortgages—Foreign associations.** Where a contract for a loan with a foreign building and loan association is made payable in its state and expressly stipulates that it is made subject to the laws of such state, it will be governed by them. *Russell v. Pierce*, 121 Mich. 208 (80 N. W. Rep. 118). Where the parties to a mortgage given to a foreign building and loan association understand that payments are to be made to the local agent of the association in the state where the land is situated, the transaction will be governed by the laws of that state, although the mortgage by its terms provides for the payments to be made in the state of the association. *National Mut. Bldg. & L. Ass'n v. Burch*, Mich. (82 N. W. Rep. 837). See opinion for review of authorities. Statutes (Ind. Rev. Stat. 1894, §§ 3453-3459; 4464-4483; Rev. Stat. 1901, §§ 3453-3459; 4464-4483) requiring foreign building and loan associations to conform to certain requirements before transacting business in the state will not be given a retroactive effect so as to impair the obligation of existing contracts. *Security Sav. & L. Ass'n v. Elbert*, 153 Ind. 198 (54 N. E. Rep. 753). The defense against the foreclosure of a mortgage given to a foreign building and loan association, based upon its failure to comply with Ala. Laws 1892-93, p. 665, requiring a deposit of securities in that state or the filing there of a certificate of such deposit elsewhere, cannot be raised by demurrer unless the bill of foreclosure affirmatively shows that the transaction was had in Alabama. There is no law in that state prohibiting foreign building and loan associations from doing business therein. *Eslava v. New York Nat. Bldg. & L. Ass'n*, 121 Ala. 480 (25 So. Rep. 1013).

**Sec. 585. Building and loan association mortgages—Usury.** A transaction within the scope of the legitimate business of a building and loan association is not rendered usurious merely because a member who obtains an advance upon his stock actually pays for the use of the money more than the maximum legal rate of interest. *Morgan v. Interstate Bldg. & L. Ass'n*, 108 Ga. 185 (33 S. E. Rep. 964). Construing and applying Ala. Code 1886, § 1556, authorizing building and loan associations to loan to their members funds on hand, "on such security and on such terms and

conditions as may be prescribed by the by-laws," it is held that a loan is not rendered usurious by the fact that interest and premium agreed to be paid by the borrower exceeds the legal rate of interest, or by deduction of the premium from the sum loaned. *Sheldon v. Birmingham Bldg. & L. Ass'n*, 121 Ala. 278 (25 So. Rep. 820). In Indiana it is held that on account of their peculiar nature transactions between building and loan associations and their borrowing members are not subject to the general usury laws, *Security Sav. & L. Ass'n v. Elbert*, 153 Ind. 198 (54 N. E. Rep. 753); *International Bldg. & L. Ass'n No. 2 v. Wall*, 153 Ind. 554 (55 N. E. Rep. 431); and in this state the payment of premiums, made monthly instead of in gross, and in pursuance of a contract by the borrower with the association without bidding for the loan, are legalized. Laws 1897, p. 287 (Rev. Stat. 1901, § 4463i). In Kentucky it is held that a statute authorizing a building and loan association to exact from a borrower under the guise of interest and premium more than the legal rate of interest, is unconstitutional; and usury thus paid may be recovered. *James v. James' Trustee*, Ky. (55 S. W. Rep. 193; 21 Ky Law Rep. 1401). In Mississippi it is held that the right of a building and loan association to exact a greater than the legal rate of interest, even under the guise of interest and premium, does not exist except as given by statute. *Sokoloski v. New South Bldg. & L. Ass'n*, 77 Miss. 155 (26 So. Rep. 361). A statute (Minn. Gen. Stat. 1894, §§ 2218, 2794) exempting building and loan associations from usury laws is constitutional. *Zenith Bldg. & L. Ass'n v. Heimbach*, 77 Minn. 97 (79 N. W. Rep. 609). By the statute law of Tennessee building and loan associations are authorized to lend their funds at a rate of interest not in conflict with the law of the state, and to take such premium as may be bid by the borrower for the right to preference or priority of the loan. Where the loan is made at the lawful rate of interest, and the premium paid is the result of open and competitive bidding, such premium does not render the contract usurious and illegal. Nor is the transaction rendered illegal by the fact that the first installment of interest and premium is taken in advance out of the amount loaned. *Vaughan v. Vaughan's Ex'x*, 97 Va. 322 (33 S. E. Rep. 603). Statutes exempting building and

loan associations of a state from the operation of usury laws are held not to apply to foreign associations. *National Mut. Bldg. & L. Ass'n v. Burch*, 124 Mich. 57 (82 N. W. Rep. 837); *Building & L. Ass'n v. Bilan*, 59 Neb. 458 (81 N. W. Rep. 308); *Sokoloski v. New South Bldg. & L. Ass'n*, 77 Miss. 155 (26 So. Rep. 361). Where the charter of a building and loan association authorizes it to issue installment stock, and also stock wholly or partly prepaid, and no preference is given to the holder of the prepaid stock over other classes, such a system does not contravene the law of building and loan associations as to mutuality; and loans made to a stockholder on the installment plan, who pays interest at the legal rate, and also premiums, dues, and fines, are not infected with usury because one class of stock is paid for in advance and the other by installments. *Kirklin v. Atlas Sav. & L. Ass'n*, 107 Ga. 313 (33 S. E. Rep. 83). The defense of usury cannot be raised by one to whom a borrower has transferred his stock and lands. *Johnson v. Southern Bldg. & L. Ass'n*, 121 Ala. 524 (26 So. Rep. 201). A borrowing member seeking to cancel a deed of trust given a building and loan association on the ground of usury, as a condition precedent, must pay the amount of the loan and interest, less the dues and interest paid and the withdrawal value of his stock. *Harmon v. Hart*, Tenn. (53 S. W. Rep. 310).

**Sec. 586. Building and loan association mortgages—**  
**Application of payments.** A purchaser of stock in a building and loan association is not entitled to have the amount paid for stock applied to the extinguishment of a loan made to her at the time she purchased the stock. *Sheldon v. Birmingham Bldg. & L. Ass'n*, 121 Ala. 278 (25 So. Rep. 820). Payments of dues on stock of a building and loan association made by a borrowing member who has executed a mortgage to it, are not payments on the mortgage debt, and do not ipso facto work an extinguishment of the mortgage. *Russell v. Pierce*, 121 Mich. 208 (80 N. W. Rep. 118). Where shares of stock issued to a borrowing member are transferred to the association only as part security for a loan, and the rules of the association, as well as the terms of the transfer, endorsed on the stock, require payments thereon to be continued, and it is further stipulated

that the borrower is entitled to have the withdrawal value of the stock applied in part payment of the loan, the relations in which he stands to the association as a borrower and as a stockholder are separate; and payments made on the stock are not upon the loan. *Hayes v. Southern Home Bldg. & L. Ass'n*, 124 Ala. 663 (26 So. Rep. 527). Upon a building and loan association declaring a loan secured by a trust deed due, in pursuance of a stipulation in the deed, for borrower's default in the payment of installments on the stock, interest and premiums, he is entitled to credit for the actual value of his stock, regardless of whether the contract was usurious. *Leary v. People's Bldg., L. & Sav. Ass'n*, 93 Tex. 1 (51 S. W. Rep. 836).

In Utah it is held that where a borrowing member of a building and loan association, besides paying interest on the loan, pays a certain amount each month, as dues on his stock in the concern, he is entitled to credit for dues paid as and for a like amount on his principal loan. *Hale v. Thomas*, 20 Utah, 426 (59 Pac. Rep. 241). He may claim credit against the principal for payments of dues and premiums, but not for interest paid on the loan. *People's Bldg., L. & Sav. Ass'n v. Kroeger*, Utah, (61 Pac. Rep. 559). But in Washington it is held that where a borrower subscribes for shares of a loan association merely to obtain a loan, and makes monthly payments on the shares under a contract whereby the maturity of the shares extinguishes the debt and cancels the stock, the contract is one of loan, on which he is entitled to have credited all payments made, whether as premiums, fines or otherwise. *Hale v. Stenger*, 22 Wash. 516 (61 Pac. Rep. 156). The court say: "The current of authority is not uniform as to the application to be made of sums paid by a borrower under similar contracts with such corporations, but we think the tendency of modern authority is in the direction of holding that all such payments, under whatever name made, whether as premiums, dues, fines or otherwise, are payments upon the loan. In equity the mortgagor is entitled to have them credited accordingly. *Association v. Cairns*, 16 Wash. 215 (47 Pac. Rep. 509); *Stevens v. Association*, Ida. (51 Pac. Rep. 986); *Association v. Shea*, Ida. (55 Pac. Rep. 1022); *Association v. Buck*, 64 Md. 338 (1 Atl. Rep. 561); *Randall v. Union*,

42 Neb. 809 (60 N. W. Rep. 1019; 62 N. W. Rep. 252; 29 L. R. A. 133); Association v. Tinsley, 96 Va. 322 (31 S. E. Rep. 508); Watkins v. Association, 97 Pa. St. 514; Harris' Appeal, Pa. (3 Atl. Rep. 776); Pryse v. Association, Ky. (41 S. W. Rep. 574); Rowland v. Association, 115 N. C. 825 (18 S. E. Rep. 965); Strauss v. Association, 117 N. C. 308 (23 S. E. Rep. 450; 30 L. R. A. 693; 53 Am. St. Rep. 585); Buist v. Bryan, 44 S. C. 121 (21 S. E. Rep. 537; 29 L. R. A. 127; 51 Am. St. Rep. 787); Sawtelle v. Building Co., 14 Utah, 443 (48 Pac. Rep. 211); Association v. Fowble, 17 Utah, 122 (53 Pac. Rep. 999); Barker v. Bigelow, 15 Gray, 130. There is much authority to the contrary. We think, however, considering the nature and character of the contract, that the true rule applicable to its adjustment is expressed in the Idaho case—Association v. Shea, Ida. (55 Pac. Rep. 1022),—where it is said: 'We construe the entire contract to be one of loan; that it was entered into solely for the purpose of borrowing money by one of the parties, and lending by the other; that the relation of corporation and stockholders exist, not in fact, but purely in fiction; and that the object of the plaintiff in entering into the contract was purely for the purpose of increasing its capital by obtaining large returns for the use of its money. In no case where the two relations are blended together as in this case, and the stock and debt are both contemporaneously extinguished by monthly payments upon the debt or upon the so-called stock, will the contract be treated by this court as other than a contract of loan.' And we think the authorities above cited abundantly support the doctrine of that case."

**Sec. 587. Building and loan association mortgages—Rights of parties upon insolvency of association.** In Indiana it is held that upon the dissolution of an association on account of insolvency, a borrowing member whose loan is secured by a real-estate mortgage and assignment of his stock who has paid the association all installments of dues, interest and premium as they matured, may discharge his obligation to the association by tendering the amount of the loan with interest thereon, less the interest and premiums he has paid. Marion Trust Co. v. Trustees of Edwards Lodge, I. O. O. F., 153 Ind. 96 (54 N. E. Rep. 444). The

court say: "All authorities agree that the borrowing member must pay the receiver the amount loaned to him, with interest at the rate fixed by law in the absence of contract, less certain deductions. The disagreement among courts is in regard to the deductions to be allowed. All allow the borrowing member credit for his monthly payments of interest on the loan. Some credit all payments, whether for dues upon stock or for interest or for premium. *Brownlie v. Russell*, 8 App. Cas. 235; *Association v. Goodrich*, 48 Ga. 445; *Windsor v. Bandel*, 40 Md. 172; *Association v. Buck*, 64 Md. 338 (1 Atl. Rep. 561); *Cook v. Kent*, 105 Mass. 246; *Bank v. Whitmore*, N. Y. Sup. (49 N. Y. Sup. 862). Others credit nothing but interest payments, and leave the borrowing member's payments on stock and on premium to be adjusted and repaid, subject to losses and expenses, at the final settlement of the trust. *Towle v. Association*, 61 Fed. Rep. 446; *Sullivan v. Spaniol*, 78 Ill. App. 125; *Sullivan v. Stucky*, 86 Fed. Rep. 491; *Choisser v. Young*, 69 Ill. App. 252. Others credit the interest and also the premium payments, and leave nothing but the stock payments to be subjected to losses and expenses. *Curtis v. Association*, 69 Conn. 6 (36 Atl. Rep. 1023); *Rogers v. Raines*, 100 Ky. 295 (38 S. W. Rep. 483); *Reddick v. Association*, Ky. (49 S. W. Rep. 1075); *Knutson v. Association*, 67 Minn. 201 (69 N. W. Rep. 889; 64 Am. St. Rep. 410); *Weir v. Association*, N. J. Eq. (38 Atl. Rep. 643); *Moran v. Gray*, N. J. Err. & App. (38 Atl. Rep. 668); *Strohen v. Association*, 115 Pa. St. 273 (8 Atl. Rep. 843); *Association v. Carroll*, 4 Pa. Dist. Rep. 6; *Rogers v. Hargo*, 92 Tenn. 35 (20 S. W. Rep. 430); *Leahy v. Association*, 100 Wis. 555 (76 N. W. Rep. 625; 69 Am. St. Rep. 945); *End. Bldg. Ass'ns* (2nd Ed.), § 531; *Thomp. Bldg. Ass'ns*, p. 396; 4 Am. & Eng. Enc. Law (2nd Ed.), p. 1081; 48 Cent. Law J. 369. The first method is inequitable, because it puts too great a share of the losses and expenses upon nonborrowing members. Equality does not subsist in allowing the borrowing members 100 per cent. on their stock payments, and the others 50 or less. The second method is inequitable, because it puts too great a share of the losses and expenses upon borrowing members. It is the ownership of the stock, and nothing else, that makes the borrowers and nonborrowers

alike members of the association. It is upon their stock and nothing else, and therefore in the capacity of stockholders, and not otherwise, that borrowers and nonborrowers alike were expecting and entitled to receive or be credited with divisions of profits. It is upon their stock, and nothing else, and therefore in their capacity of stockholders, and not otherwise, that borrowers and nonborrowers alike must be charged with losses and expenses. The nonborrowers pay only stock dues. The borrowers pay stock dues, interest and premium. Manifestly, stock dues are the only payments made by members in their capacity of stockholders. Manifestly, payments of interest and premium are made by members in their capacity of borrowers. Whether the premium be considered as a bonus or as additional interest, or whether it be paid in a lump sum (retained out of the loan) as a result of competitive bidding at stockholders' meetings, or be paid in installments on the basis of an arbitrary percentage, whether it be paid for precedence in securing the loan or as a uniform charge upon all borrowers, in any event it is paid by the members in their capacity of borrowers. As to refuse credit for payments of premium, receivers might as well refuse credit for payments of interest made under the contract. The contract has been abrogated by the association's insolvency. The interest that is charged the borrowers on settlement with the receiver is not the interest agreed upon in the contract,—it is the interest that the law, and equity following the law, exacts for the use of money had and received; and borrowers are credited with the interest payments, not as interest, but as partial payments upon the money had and received. If premiums were not to be credited as partial payments upon the money had and received, and if they were to remain in the account subject to losses and expenses, a nonborrowing member, who had paid in \$500 on 25 shares of stock, and was entitled only to the same dividends of profit as the borrowing member with 25 shares, would stand to lose only \$500, while the borrowing member, who had paid \$500 on stock and \$500 on premium, would stand to lose \$1,000. The third method is equitable, because it adjusts the losses among the members according to their interests as stockholders. Equality requires that losses shall be borne by those who

have shared the profits, and in the same proportions." In the later case of *Myers v. Mutual Life Ins. Co.*, 153 Ind. 204 (54 N. E. Rep. 755), the same court says: "Whether the fund and the claims result from the insolvency of a life insurance, fire insurance, building and loan, savings bank, or any other enterprise, if the court finds in its hands assets, which were made up from the contributions of claimants, and from the profits of handling which, if the profits had been made, those claimants would have been entitled to dividends, no claimant whose debt is a part of the assets may set off against his debt the amount of his contributions as investor, but must pay his debt in full, to the end that the losses shall be borne by those who would have shared the profits, and in the same proportions. *Marion Trust Co. v. Edwards Lodge*, I. O. O. F., 153 Ind. 96 (54 N. E. Rep. 444), and cases there cited; *Wohlford v. Association*, 140 Ind. 662 (40 N. E. Rep. 694, 29 L. R. A. 177); *Osborn v. Byrne*, 43 Conn. 155 (21 Am. Rep. 641); *Stockton v. Bank*, 32 N. J. Eq. 163; *Hannon v. Williams*, 34 N. J. Eq. 255 (38 Am. Rep. 378); *Lawrence v. Nelson*, 21 N. Y. 158; *Newcomb v. Almy*, 96 N. Y. 308; *Hillier v. Insurance Co.*, 3 Pa. St. 470 (45 Am. Dec. 656); *Long v. Insurance Co.*, 6 Pa. St. 421; *Care v. Brown*, 31 Wkly. Notes Cas. 501."

**Sec. 588. Miscellaneous notes.** A creditor attaching a mortgagor's equity of redemption who wishes to protect any interest that he may have in the proceeds remaining in the mortgagee's hands upon the foreclosure sale, must give due notice of his attachment to the mortgagee. *Hardy v. Beverly Sav. Bank*, 175 Mass. 112 (55 N. E. Rep. 811; 78 Am. St. Rep. 479). The proper procedure to bar the rights of a judgment lien creditor, who was not made a party to the foreclosure of a prior mortgage, is an action to compel him to redeem within a reasonable time or be barred and foreclosed. *Koerner v. Willamette Iron Works*, 36 Or. 90 (58 Pac. Rep. 863; 78 Am. St. Rep. 759). N. Dak. Rev. Codes, § 4699, providing that "a mortgage of real property can be created, renewed or extended only by writing executed with the formalities required in the case of a grant of real property," has no reference whatever to an extension of time for the payment of a debt secured by a



mortgage; but a mortgage is "extended" only when it is made to stand as security for some debt or obligation not originally included therein. *People's State Bank v. Francis*, 8 N. Dak. 369 (79 N. W. Rep. 853). Citing, *Stoddard v. Hart*, 23 N. Y. 556. A debtor transferring to his creditor's agent as collateral security a mortgage held by him on certain land who, upon foreclosure of the mortgage by such agent, causes the land to be bid in at the face value of the mortgage and a deficiency judgment to be taken against the mortgagor for the balance due, cannot recover the difference in money between the amount of the indebtedness to the agent's principal and the amount of the purchase price of the property at the sale, but on payment of his indebtedness he may have a conveyance of the property and an assignment of the deficiency judgment. *Hoult v. Ramsbottom*, 127 Cal. 171 (59 Pac. Rep. 587).

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## NOTICE

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### EPITOME OF CASES.

**Sec. 589. "Actual" notice defined..** Knowledge that a warranty deed was executed for \$250, followed four days thereafter by a bond for reconveyance by the grantee back to the grantor upon the payment of the same sum, and knowledge of the record of the bond four days after the record of the deed, is actual notice, within the meaning of § 3, ch. 119, Kan. Gen. Stat. 1897, to one who holds by quitclaim deed immediately from the grantee in the warranty deed, that such deed and bond for deed were given as security for money, and not as a conveyance and agreement for reconveyance of the land. *Pope v. Nichols*, 61 Kan. 230 (59 Pac. Rep. 257). The court say: "Actual notice does not mean that which, in metaphysical strictness, is actual in its nature, because it is seldom that ultimate facts can be communicated in a manner so direct and

unequivocal as to exclude doubts as to their existence or authenticity. Actual notice means, among other things, knowledge of facts and circumstances so pertinent in character as to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts. 16 Am. & Eng. Enc. Law (1st Ed.), p. 790; Wade, Notice (2nd Ed.), §§ 3-5 et seq. In § 5 the author says: 'There are two classes of actual notice, which, for convenience, may be designated as (1) express, which includes all knowledge or information coming to the party to be charged, of a degree above that which depends upon collateral inference, or which imposes upon him the further duty of inquiry; and (2) implied, which imputes knowledge to the party because he is shown to be conscious of having the means of knowledge, though he does not use them; in other words, where he chooses to remain voluntarily ignorant of the fact, or is grossly negligent in not following up the inquiry which the known facts suggest.'

**Sec. 590. Knowledge sufficient to charge one with notice.** Where one holding land as a trustee conveys it to another who has notice of the trust, he is put upon inquiry as to its terms. *Mayfield v. Turner*, 180 Ill. 332 (54 N. E. Rep. 418). Where an owner neglects to record his title, every presumption is in favor of a subsequent purchaser, and vague and indefinite recitals in recorded instruments are not sufficient notice to put him on inquiry outside the record. *Pyles v. Brown*, 189 Pa. St. 164 (42 Atl. Rep. 11; 69 Am. St. Rep. 794). Where the attorney of a mortgagor who drafted the mortgage accepts a deed from the mortgagor to land which he knows to be included in the proper description, pending an action to correct a description in the mortgage, he takes with notice of the mortgagee's equity. *Wittkowsky v. Gidney*, 124 N. C. 437 (32 S. E. Rep. 731). Where a purchaser has knowledge of any fact or circumstance sufficient to put him upon inquiry as to the existence of some right or title in conflict with that which he is about to purchase, and makes the inquiry suggested by such fact or circumstance and anything detrimental to the right he is about to acquire is concealed or withheld from him, he cannot afterwards be charged with notice of it, or be affected by an undisclosed incumbrance

(or latent equity. *Kelly v. Fairmount Land Co.*, 97 Va. 227 (33 S. E. Rep. 598).

**Sec. 591. Charging notice to principal on account of his agent's knowledge.** A client is not charged with knowledge of his attorney acquired while acting as attorney for another. *Steinmeyer v. Steinmeyer*, 55 S. C. 9 (33 S. E. Rep. 15); *Mack v. McIntosh*, 181 Ill. 633 (54 N. E. Rep. 1019). A wife purchasing real estate through her husband acting as her agent takes subjects to liens thereon of which he had actual knowledge. *Forsythe v. Brandenburg*, 154 Ind. 588 (57 N. E. Rep. 247). Where a trustee under a mortgage purchases the property as agent for his wife at a trustee's sale thereof, after satisfaction of the mortgage of which he had knowledge, she will be charged with notice of his fraudulent conduct. *Allen v. Garrison*, 92 Tex. 546 (50 S. W. Rep. 335). One who places her money with an investment company to be invested by it, relying upon its judgment as to the security taken and accepts the results of its action by receiving a note and mortgage given for the funds, is charged with knowledge of facts known by the company affecting the priority of the lien. *Fischer v. Toohy*, 186 Ill. 143 (57 N. E. Rep. 801).

**Sec. 592. Notice by publication—Statutes construed.** The fact that a clerk and master of a chancery court, as such officer and as receiver, is the complainant in a cause in such court, and makes an affidavit of the nonresidence of a defendant does not disqualify him from making an order for publication of notice to such defendant. *Akin v. Watson*, Tenn. (52 S. W. Rep. 905). A notice of the sale of real estate, setting the time of sale for Monday, May 17th, and first published in a weekly newspaper on Friday, April 16th, and continued through every successive issue of the paper preceding the sale day, is a publication "for at least thirty days before the day of sale," as required by statute, regardless of the fact that May 16th was Sunday. *Matthews v. Arthur*, 61 Kan. 455 (59 Pac. Rep. 1067). The finding of a court of general jurisdiction as to jurisdictional facts necessary to constitute service by publication are conclusive as against collateral attack, unless such findings are irreconcilable with facts otherwise disclosed by the

record, and that in aid of such findings, and in aid of any apparent conflict in the record, it will be presumed evidence was heard to support the findings in all cases where it is competent to receive evidence for that purpose. *Figge v. Rowlen*, 185 Ill. 234 (57 N. E. Rep. 195). Mass. Laws 1898, ch. 562, providing a system for the registration of land titles, is not unconstitutional because proceedings thereunder may be had on notice by mail, by publication and by posting, to all persons who are known to make any claim to the land. *Tyler v. Judges of the Court of Registration*, 175 Mass. 71 (55 N. E. Rep. 812; 51 L. R. A. 433). Title to land standing of record in the name of *Singleton V. Turner* cannot be divested by proceedings to enforce the state's lien for taxes, under Mo. Rev. Stat. 1889, § 7682, based upon service by publication against *Vaughn Turner*, although such owner was commonly known by that name. *Turner v. Gregory*, 151 Mo. 100 (52 S. W. Rep. 234). Mo. Rev. Stat. 1889, §§2022, 2024 construed and applied—sufficiency of order of publication. *Winningham v. Trueblood*, 149 Mo. 572 (51 S. W. Rep. 399). Construing a statute (Mo. Gen. Stat. 1865, p. 498, § 25) requiring that a notice to show cause why a decedent's land should not be sold to pay debts shall be published four weeks before the term of court at which the order of sale is to be made, requires the first publication to be made at least twenty-eight days prior to the first day of the term, and a sale made on a notice the first publication of which is made less than twenty-eight days before the beginning of the term is void, although it appeared in four issues of a weekly newspaper before said day, *Young v. Downey*, 150 Mo. 317 (51 S. W. Rep. 751); but in Pennsylvania it is held that a statute (Pa. Laws 1836, p. 772), requiring an officer making a sale to give notice by advertisement "once a week for three successive weeks," does not require that the first notice shall be three full weeks, or twenty-one days, before the day of sale, *McKee v. Kerr*, 192 Pa. St. 164 (43 Atl. Rep. 953). For a discussion as to what constitutes a newspaper within the meaning of Neb. Code Civ. Proc., § 497, requiring the publication of certain notices in a newspaper, see *Hanscom v. Meyer*, 60 Neb. 68 (82 N. W. Rep. 114; 48 L. R. A. 409).

# NUISANCE

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CITY OF VALPARAISO v. BOZARTH.

(153 Ind. 536.)

**House encroaching on public street as a nuisance—Abatement without notice to remove.** A house erected on leased premises by the lessee so as to encroach on a public street is a public nuisance; and an action for its abatement may be maintained without previous notice to the lessee to remove or abate the nuisance.

MONKS, J.

**Sec. 593. Statement of the case.** This action was brought by appellant against appellees to abate a nuisance. The court made a special finding of the facts, and stated conclusions of law thereon, and rendered judgment against appellant. The only error assigned calls in question the second conclusion of law. It appears from the special finding that appellee Bozarth is the owner of a part of an outlot in the city of Valparaiso fronting on Morgan street, and that he acquired title thereto in fee simple in 1876. In 1879 said Bozarth granted to appellee Stephens, his mother, the right to erect on said real estate a two-story frame dwelling house, which house was to be and remain the property of said Stephens, and under her control, with the right on her part to collect all the rents and income thereof, and to remove the dwelling house from the premises whenever she desired to do so. Morgan street runs north and south, and bounds said outlot on the west. Said appellee Stephens, by virtue of her interest in said real estate, in 1879 built a frame dwelling house on said lot and on Morgan street, the same extending into said street 6.1 feet. Said house is substantially built, with a brick foundation under the same, and is of the value of \$800, and at the time of the commencement of this action was occupied by appellees. At the time said house was built there was

a fence running north and south on a line four feet west of the most westerly part of said house, and across the premises, which fence had been there twelve years, and the houses and other improvements on Morgan street were on a line with the fence aforesaid; and appellee Stephens when she built said house, and down to the time of the commencement of this action, had no notice or knowledge that said fence was in the limits of Morgan street, but in good faith believed that she was erecting her said house within the boundary of the real estate described in her contract, and not in said street. The conclusions of law stated by the court were: First, that the house, in so far as it extends upon the street, is a nuisance, and should be abated; second, that said action was prematurely brought for want of notice.

**Sec. 594. House encroaching on public street as a nuisance—Abatement without notice to remove.** It is settled in this state that a permanent structure like the one erected by appellee Stephens, which encroaches upon the street, is per se a public nuisance. *State v. Berdetta*, 73 Ind. 185 (38 Am. Rep. 117, and note, p. 127); *Pettis v. Johnson*, 56 Ind. 139; *Adams v. Ohio Falls Car Co.*, 131 Ind. 375, 379 (31 N. E. Rep. 57); *Sims v. City of Frankfort*, 79 Ind. 446, 451; *State v. Louisville, N. A. & C. Ry. Co.*, 86 Ind. 114, 116; *Bybee v. State*, 94 Ind. 443, 446, 447 (48 Am. Rep. 175). See note to *Drew v. Town of Geneva*, 150 Ind. 662 (50 N. E. Rep. 871; 42 L. R. A. 814, 825); note to *Mayor, etc., v. Witmer*, 86 Md. 293 (37 Atl. Rep. 965; 39 L. R. A. 649, 685). It is settled that when a party erects, or is the author of, a nuisance, an action may be maintained against him to abate the nuisance without any notice or request to remove the same. 1 Hill. Torts, 710; Ang. Water Courses, § 403; Wood, Nuis. (2nd Ed.), § 838; Washb. Easms. (3d Ed.), 693-696; 14 Enc. Pl. & Prac. 1110, 1111; 2 Jag. Torts, pp. 795-797; *Steinke v. Bentley*, 6 Ind. App. 663, 669 (34 N. E. Rep. 97); *Curtice v. Thompson*, 19 N. H. 471; *Wason v. Sanborn*, 45 N. H. 169; *Eastman v. Amoskeag Manufacturing Co.*, 44 N. H. 143 (82 Am. Dec. 201, 208, 211); *Brown Paper Co. v. Dean*, 123 Mass. 267; *Prentiss v. Wood*, 132 Mass. 488; *Inhabitants of New Salem v. Eagle Mill Co.*, 138 Mass. 8; *McDonough*

v. Gilman, 3 Allen, 264 (80 Am. Dec. 72, and note, p. 75); Plumer v. Harper, 3 N. H. 88 (14 Am. Dec. 333, and note, pp. 336-341); Ray v. Sellers, 1 Duv. 254; Slight v. Gutzlaff, 35 Wis. 675 (17 Am. Rep. 476); Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 51 N. Y. 573 (10 Am. Rep. 646); Fish v. Dodge, 4 Denio, 311 (45 Am. Dec. 474); Sloggy v. Dilworth, 38 Minn. 179 (36 N. W. Rep. 451; 8 Am. St. Rep. 656); Branch v. Doane, 17 Conn. 402, 418; note to Jones v. Lewis, 13 Conn. 303 (33 Am. Dec. 407). It is held in many cases that the grantee or lessee of real estate upon which there is an existing nuisance of a nature not essentially unlawful is liable to an action therefor only after notice to remove or abate it. Slight v. Gutzlaff, 35 Wis. 675 (17 Am. Rep. 476); Pierson v. Glean, 14 N. J. L. 36 (25 Am. Dec. 497, and note, p. 499); Eastman v. Amoskeag Manufacturing Co., 44 N. H. 143 (82 Am. Dec. 201); Plumer v. Harper, 3 N. H. 88, 91 (14 Am. Dec. 333-341, and note, pp. 336-341); Woodman v. Tufts, 9 N. H. 88; McDonough v. Gilman, 3 Allen, 264 (80 Am. Dec. 72, and note, p. 75); Nichols v. City of Boston, 98 Mass. 39, 43 (93 Am. Dec. 132, and note, p. 136); Brown Paper Co. v. Dean, 123 Mass. 267, 269; Prentiss v. Wood, 132 Mass. 486, 488; Branch v. Doane, 17 Conn. 402, 418; Johnson v. Lewis, 13 Conn. 303 (33 Am. Dec. 405); Crommelin v. Coxe, 30 Ala. 318 (68 Am. Dec. 120, and note, p. 126); Blunt v. Aikin, 15 Wend. 523 (30 Am. Dec. 72); Waggoner v. Jermaine, 3 Denio, 306 (45 Am. Dec. 474, and note, p. 479); Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 51 N. Y. 573 (10 Am. Rep. 646); Ahern v. Steele, 115 N. Y. 203, 210, 213 (22 N. E. Rep. 193; 5 L. R. A. 449; 12 Am. St. Rep. 778, and note, pp. 800, 801); Huckenstine's Appeal, 70 Pa. St. 102 (10 Am. Rep. 669); Thornton v. Smith, 11 Minn. 15 (Gil. 1); Sloggy v. Dilworth, 38 Minn. 179 (36 N. W. Rep. 451; 8 Am. St. Rep. 656, and note, p. 661); Pierce v. German, etc., Society, 72 Cal. 180 (13 Pac. Rep. 478; 1 Am. St. Rep. 45); Grigsby v. Waterworks Co., 40 Cal. 396; Groff v. Ankenbrandt, 124 Ill. 51 (15 N. E. Rep. 40; 7 Am. St. Rep. 342, and note, p. 345); Pillsbury v. Moore, 44 Me. 154 (69 Am. Dec. 91, and note, p. 94); Mayor, etc., of Georgetown v. Alexandria Canal Co., 12 Pet. 91 (9 L. Ed. 1012); Penruddock's Case, 5 Coke, 100; Westbourne v. Mordant, Cro. Eliz. 191; Some v. Barwish,

Cro. Jac. 231; Brent v. Haddon, Cro. Jac. 555. The rule requiring notice to the grantee or lessee in such cases has been seriously questioned in some cases, and denied in others. Caldwell v. Gale, 11 Mich. 77; Norton v. Volentine, 14 Vt. 239 (39 Am. Dec. 220); Brown v. Railroad Co., 12 N. Y. 486, 492; Hubbard v. Russell, 24 Barb. 404; Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 52 Barb. 390; 51 N. Y. 573; Morris Canal & Banking Co. v. Ryerson, 27 N. J. L. 457; note to Plumer v. Harper, 3 N. H. 88 (14 Am. Dec. 340, 341); note to Pierson v. Glean, 14 N. J. L. 36 (25 Am. Dec. 499). It is expressly found in this case that Mrs. Stephens erected the dwelling house so that it extended 6.1 feet into the street. She was the creator of the nuisance. It is evident, therefore, that the rule that a grantee or lessee of real estate is not liable for a nuisance not created by him until after notice or request to remove the same, if correct, does not apply to said appellee, because she erected the nuisance. The recorded plat of said city was constructive notice of the limits of the street and of the outlot. The boundaries of the real estate described in her contract were also constructive notice of the east line of the street. She had an equal opportunity with the city to ascertain the boundaries of said real estate. The fact that others had encroached upon the street by building fences and houses thereon was no excuse for said appellee erecting her dwelling house in the street. It follows that the court erred in the second conclusion of law. Judgment reversed, with instructions to restate the second conclusion of law, and render judgment in favor of appellant in accordance with this opinion.

#### Note.

A tenant for years is not responsible in damages to a third person for maintaining and keeping in repair, upon the demised premises, a structure, erected thereon by his landlord prior to the commencement of his term, which operates to the nuisance of such third person. The remedy of the injured party is against the landlord alone. Meyer v. Harris, 61 N. J. L. 83 (38 Atl. Rep. 690). The grantee of land continuing a nuisance thereon cannot be subjected to an action on account thereof until after notice to him to remove or abate it. Castle v. Smith,

Cal. (36 Pac. Rep. 859); Middlebrooks v. Mayne, 96 Ga. 449 (23 S. E. Rep. 398). But this rule does not apply to a purchaser who was an actor in creating the nuisance, Steinke v. Bentley, 6 Ind. App.



663 (34 N. E. Rep. 97); nor in case of an action against a grantee for injuries occasioned by changes made by him in the character or structure of the nuisance. *Middlebrooks v. Mayne*, 96 Ga. 449 (23 S. E. Rep. 398). The rule that a lessee or grantee continuing a nuisance cannot be held liable for injury by reason of it, without a notice to abate it, does not apply where a person rightfully using a public highway is injured by an illegal obstruction maintained therein. *Arpin v. Bowman*, 83 Wis. 54 (53 N. W. Rep. 151). Citing, *Irvine v. Wood*, 51 N. Y. 224 (10 Am. Rep. 603); *Cooley, Torts* (2nd Ed.), p. 729, and notes. A landlord is not liable for the act of his tenant who has the exclusive possession of the premises in obstructing the flow of surface water, where he neither licensed nor consented to such obstruction. *Baker v. Allen*, 66 Ark. 271 (50 S. W. Rep. 511; 74 Am. St. Rep. 93); *Edgar v. Walker*, 106 Ga. 454 (32 S. E. Rep. 582).

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#### EPITOME OF CASES.

**Sec. 595. What constitutes a nuisance.** In order for the use of property to constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property or such as to render its enjoyment uncomfortable or inconvenient. *Hoadley v. M. Seward & Son Co.*, 71 Conn. 640 (42 Atl Rep. 997). A tobacco drying house, the noxious odors from which render the occupation of the property of another unpleasant and unhealthful, may be abated as a nuisance. *Hundley v. Harrison*, 123 Ala. 292 (26 So. Rep. 294). Open cattle yards and pens within the corporate limits of a town, where cattle in numbers are kept for a long period of time, to be fed and fattened for market, belong to that class of things which "must necessarily" become nuisances, and may be abated under a general prohibitory ordinance declaring it a nuisance to so keep cattle within the corporate limits. *Board of Aldermen v. Norman*, 51 La. Ann. 736 (25 So. Rep. 401). Under *Mills' Ann. Colo. Stat.*, § 4403, subd. 68, empowering municipal authorities to prevent by ordinance the pollution of a stream from which the municipality derives its supply of water, for the distance of five miles from the point from which such supply is taken, it is held that the maintenance of a pig sty and slaughter

house in such close proximity to the stream that the drainage therefrom flowed into it, is a nuisance per se, and a violation of an ordinance prohibiting the pollution of the stream. *City of Durango v. Chapman*, 27 Colo. 169 (60 Pac. Rep. 635). A sewer leading from a hotel to carry off filth and foul water, which becomes broken on account of its negligent construction, and thereby discharges its contents upon and about adjoining property so as to cause sickness, discomfort and inconvenience to persons residing thereon, is a nuisance. *Adams Hotel Co. v. Cobb*, Ind. Ter. (53 S. W. Rep. 478). A railroad company acquiring lands in the heart of a city for terminal purposes cannot disregard the comfort and convenience of adjacent property owners, in its use of them. *Ridge v. Pennsylvania R. Co.*, 58 N. J. Eq. 172 (43 Atl. Rep. 275). Nitroglycerine is a substance usually recognized as highly explosive and dangerous, the storage of which at any place is a constant menace to the property in that vicinity. And one who stores it on his own premises is liable for injuries caused to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage nor is chargeable with negligence contributing to the explosion. A right of action will exist in favor of all property within the circle of danger, and the fact that the property injured was not adjacent to those on which the explosive substance was stored will not defeat a recovery. *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.*, 60 O. St. 560 (54 N. E. Rep. 528; 45 L. R. A. 568; 71 Am. St. Rep. 740). See opinion for exhaustive collation and review of authorities on liability for injury by explosives.

It is not a nuisance for a city or an abutting lot owner to permit a contractor to make mortar beds in a street for the erection of buildings abutting thereon. *Strauss v. City of Louisville*, Ky. (55 S. W. Rep. 1075). A garbage furnace constructed by a city on the most scientific principles and in the most unobjectionable place within its limits is not a public nuisance because it may be an annoyance to some persons in its vicinity. *Fisher v. American Reduction Co.*, 189 Pa. St. 419 (42 Atl. Rep. 36). A public jail properly erected by a municipality having authority to erect such a building is not per se a nuisance so as to give one whose property is injured thereby a right to

damages; but if the public authorities permit the jail to be so negligently kept as to create a nuisance, a property owner damaged for this reason has a right of action. *Long v. City of Elberton*, 109 Ga. 28 (34 S. E. Rep. 333; 46 L. R. A. 428; 77 Am. St. Rep. 363). Oil and gas wells are not nuisances per se. Whether they are nuisances to a dwelling house and its appurtenances depends on their location, capacity and management. When such a well has such capacity, management and location with regard to a dwelling house and its appurtenances as materially to diminish the value thereof as a dwelling, and seriously interfere with its ordinary comfort and enjoyment, it is an abatable nuisance; but if there is any way such a well can be operated so as not to make it such a nuisance, only the unlawful operation thereof will be enjoined. *McGregor v. Camden*, 47 W. Va. 193 (34 S. E. Rep. 936). Particular case in which a factory for the rendering of dead animals was held not to be a nuisance. *Tiede v. Schneidt*, 105 Wis. 470 (81 N. W. Rep. 826). For particular case in which a shoddy mill was held not to be a nuisance, see *Davis v. Whitney*, 68 N. H. 66 (44 Atl. Rep. 78).

**Sec. 596. What constitutes a nuisance—Obstruction or purpresture in highway or street—Right to injunction against.** The unauthorized construction of a railroad in a street is a nuisance which may be enjoined by any one specially injured thereby. *Louisville & N. R. Co. v. Mobile, J. & K. C. R. Co.*, 124 Ala. 162 (26 So. Rep. 895). It is unlawful to lay a natural gas pipe line upon the surface of a highway, and one who does so is liable for injuries resulting to a third party therefrom without the latter's negligence. *Indiana Nat. & Ill. Gas Co. v. McMath*, 26 Ind. App. 154 (57 N. E. Rep. 593). In the case of the obstruction of a highway, under ordinary circumstances, where there is no special injury, and where the remedy by indictment is sufficient to abate the nuisance and to restore to the public use of the entire highway, equity will not interfere. *H. B. Anthony Shoe Co. v. West Jersey R. Co.*, 57 N. J. Eq. 607 (42 Atl. Rep. 279). One cannot establish a right to maintain an obstruction in a highway which interferes with an abutting owner's access to his premises, by showing that such obstruction would not be an inter-

ference if the abutting owner had a wider gate for entering onto his premises, where the gate maintained by the latter would be sufficient were the obstruction removed. To entitle an abutting owner to an injunction to effect the removal of a fence built in a public highway in front of his premises and which constituted a public nuisance, it is not necessary that he be deprived entirely of the means of access to his real estate, but he is entitled to such relief where the maintenance of such fence materially impairs and interferes with his means of access to his premises, and its continuance will depreciate the rental and market value of his premises. *Martin v. Marks*, 154 Ind. 549 (57 N. E. Rep. 249). In discussing the right of an individual to have injunction against the obstruction of a highway the supreme court of Illinois, in the case of *Chicago Gen. Ry. Co. v. Chicago, B. & Q. R. Co.*, 181 Ill. 605 (54 N. E. Rep. 1026), say: "Obstruction to public highways are public nuisances. Courts of equity will not interpose by injunction to prevent the creation of a nuisance or pre-empture when the right is doubtful, and there is a remedy at law, and when the party asking the aid of equity shows no private injury actually sustained or justly apprehended by him. A court of equity will not interpose to prevent the obstruction of a public highway at the instance of a private individual merely because such obstruction is a public nuisance, but it must further appear that such obstruction will work a special injury to the individual complaining. The injury in such case must be one which cannot be compensated in an action at law. Where the bill to enjoin the obstruction which is alleged to constitute a public nuisance is filed by a private individual, it must not only be shown that he will suffer a special injury, but also that he will sustain irreparable damage. Where it does not appear that there will be irreparable damage the relief will not be granted, even though the complainant may show a special and personal injury. 1 High, Inj. (3d Ed.), § 817; *Bridge Co. v. Summers*, 13 W. Va. 484; *Draper v. Mackey*, 35 Ark. 499; *Elliott, Roads & S.*, pp. 496, 497; *Green v. Oakes*, 17 Ill. 249. When irreparable injury is spoken of, it is not meant that the injury is beyond the possibility of repair, or beyond the possibility of compensation in damages, but it must be of such constant and fre-

quent recurrence that no fair or reasonable redress can be had therefor in a court of law. 2 Wood, Nuis. (3d Ed.), § 778; Elliott, Roads & S., p. 497. Where, however, the right of the public to the use of a highway is clear, and a special injury is threatened by the obstruction of the highway, and this special injury is serious,—reaching the very substance and value of the plaintiff's estate,—and is permanent in its character, a court of equity will prevent the nuisance by injunction. *Bridge Co. v. Summers*, 13 W. Va. 484. In *Snell v. Buresh*, 123 Ill. 151 (13 N. E. Rep. 856), we said: 'While courts of equity will not interfere by injunction to prevent the obstruction of a highway or the creation of a nuisance when the right may be doubtful and there is a remedy at law, yet, as said in *Green v. Oakes*, 17 Ill. 249, where the right is clear, and appertains to the public, and an individual is directly and injuriously affected by the obstruction or the creation of a nuisance, they will interfere, on the application of such individual, to prevent the threatened wrong or invasion of the common right.'

**Sec. 597. Frightening objects in highway.** An abutting land owner who knowingly maintains in the limits of a highway a cloth cap over a bunch of hay in such a manner as naturally would frighten horses of ordinary gentleness passing along and over the highway, is guilty of maintaining a nuisance, and is liable for damages resulting to a passerby on account of his horse becoming frightened thereat. *Lynn v. Hooper*, 93 Me. 46 (44 Atl. Rep. 127; 47 L. R. A. 752). The court say: "It is impossible to state a general rule by which it can be determined whether any particular object constitutes a nuisance or not. The question must depend upon the conditions and circumstances in each case. Conditions vary. No two cases are alike. Hence it is rare that one case can be a binding precedent for another. Its distance from the traveled path, its relation to fences and other objects, its height or depth from the road, its color, whether it is customarily found in similar places and under similar conditions, whether it is so situated that horses being driven come suddenly in sight of it, whether it is in repose, or whether it is fluttering like a living thing,—these and many other

considerations must be taken account of in determining whether the object is a nuisance, or is dangerous to public travel. This suggestion is fully borne out by an examination of cases concerning objects causing fright, some of which we cite: A pile of shingles,—*Merrill v. Hampden*, 26 Me. 234; *Lawrence v. Mt. Vernon*, 35 Me. 100; evergreen tree standing in cart,—*Davis v. Bangor*, 42 Me. 522; a rock,—*Card v. Ellsworth*, 65 Me. 547 (20 Am. Rep. 722); a cow,—*Perkins v. Fayette*, 68 Me. 152; a hole,—*Spaulding v. Winslow*, 74 Me. 528; a pile of stones,—*Clinton v. Howard*, 42 Conn. 294; a pile of plastering,—*Dimock v. Sufield*, 30 Conn. 129; a tent,—*Ayer v. Norwich*, 39 Conn. 376 (12 Am. Rep. 396); a watering trough painted red,—*Cushing v. Bedford*, 125 Mass. 526; bales of hay charred by fire,—*Morse v. Richmond*, 41 Vt. 435 (98 Am. Dec. 600); a hollow log blackened by fire,—*Forshay v. Glen Haven*, 25 Wis. 288; sled with tubs on it,—*Judd v. Fargo*, 107 Mass. 264; rubbish,—*Burgess v. Gray*, 1 Man., G. & S. 578. See, also, cases in note in *Elliot, Roads & S.* 449. Most of these objects were held to be nuisances, or imperiling travel."

**Sec. 598. City barn as nuisance.** In the case of *Kaspar v. Dawson*, 71 Conn. 405 (42 Atl. Rep. 78), the supreme court of Connecticut say: "The authorities are numerous that a barn or stable within the limits of a city, and in proximity to residences, is not necessarily a nuisance, since it may be so built and kept that those living near are not necessarily annoyed by odors proceeding from it; but although the purpose for which it is used be a lawful one, and though it be built by one upon his own land, yet when it is so constructed or used that the smells or noises therefrom are so offensive and disagreeable as to render life uncomfortable to those dwelling in neighboring houses it is a nuisance, and a court of equity, upon proper application, will restrain the owner or keeper of such stable from so using his property as to injure his neighbor. 2 Wood, Nuis. § 594; *Aldrich v. Howard*, 8 R. I. 246; *Rounsaville v. Kohlheim*, 68 Ga. 668 (45 Am. Rep. 505); *Whitney v. Bartholomew*, 21 Conn. 212; *Hurlbut v. McKone*, 55 Conn. 31 (10 Atl. Rep. 164); *Bank v. Manion*, 87 Md. 68 (39 Atl. Rep. 90)."

**Sec. 599. Cemetery as nuisance.** A statute (Wis. Rev. Stat., § 1454) prohibiting as a nuisance the establishment of a cemetery within a certain distance of any building or inhabited dwelling of any city or town without the consent of the proper municipal authorities is constitutional, as a valid exercise of the police power. See opinion for construction of this statute. *Pfleger v. Groth*, 103 Wis. 104 (79 N. W. Rep. 19). The court say: "It is urged in support of the demurrer that cemeteries are not nuisances per se. That may be admitted. They are necessary and rightly regarded as sacred places. They ought not to be considered injurious to people of average sensibilities and intellect from the mere fact that they are the resting places of the dead. With the customary laid out walks and drives, the mounds, the flowers and shrubs, the monuments and inscriptions, and many other incidents that may be mentioned characterizing a modern cemetery, they are in many respects places of beauty as well as of inevitable decay. Nevertheless, public welfare requires reasonable regulations in regard to their location and management. All mere sentimental considerations and individual interests bearing unjustly upon the interests of others ought to give way to the necessities of the case, and the police power of the state is ample to secure that result. The prevention of the location of cemeteries in the thickly populated portions of the country, or where such condition is probable, or near dwelling houses actually existing, has generally been considered a proper exercise of police power when regulations in that regard have been challenged on constitutional grounds. *City of Philadelphia v. Westminster Cemetery Co.*, 162 Pa. St. 105 (29 Atl. Rep. 349); *Crowell v. Londonderry*, 63 N. H. 42; *Craig v. First Presbyterian Church*, 88 Pa. St. 42 (32 Am. Rep. 417); *City Council of Charleston v. Wentworth St. Baptist Church*, 4 Strob. 306; *Woodlawn Cemetery v. Inhabitants of Everett*, 118 Mass. 354; *Humphrey v. Board*, 109 N. C. 132 (13 S. E. Rep. 793); 5 Am. & Eng. Enc. Law (2nd Ed.) 792, and notes."

**Sec. 600. Legislative and municipal control.** It is the province of the legislature to prescribe what shall constitute a nuisance, within the fundamental limitation of its authority. *State v. Beardsley*, 108 Ia. 396 (79 N. W. Rep. 138).

The fact that a particular use of property is declared a nuisance by a town ordinance does not make it such unless it is in fact so, and is embraced within the common law or statutory idea of a nuisance. The thing or act complained of must come within the legal notion of a nuisance, and, where it does not, no authority to remove or abate is derived from the ordinance declaring it a nuisance. But where a thing or act complained of is a nuisance, or must necessarily become such, a municipal corporation may, in the exercise of the police power, make regulations for its suppression and prohibition. *Board of Aldermen v. Norman*, 51 La. Ann. 736 (25 So. Rep. 401). A public laundry is not a nuisance per se, and a municipality has no power to adopt an ordinance to prevent one from operating a laundry, on conditions different from others, who use machinery in carrying on their business. *City of Shreveport v. Robinson*, 51 La. Ann. 1314 (26 So. Rep. 277). A city cannot license the erection of scales in a street, which otherwise would be a nuisance, without express statutory authority. *State v. Stroud*, Tenn. (52 S. W. Rep. 697). Statutory authority to construct and operate a railroad does not authorize it to locate and operate a turntable in such a place and manner as to constitute a private nuisance. *Garvey v. Long Island R. Co.*, 159 N. Y. 323 (54 N. E. Rep. 57; 70 Am. St. Rep. 550). A city is not liable to an individual for damages resulting to him from a public nuisance created by another, on account of its failure to exercise its statutory power to abate the nuisance. *Mayor, etc., of City of Chattanooga v. Reid*, 103 Tenn. 616 (53 S. W. Rep. 937). A municipal corporation whose charter gives it "full power to regulate privies, specify the character of boxes and other fixtures for them," and to "pass such ordinances as they deem necessary to preserve the health of the town," may summarily abate without a judicial hearing a privy vault used and maintained in violation of a valid ordinance by it, although the vault was built before the passage of the ordinance. *Sprigg v. Town of Garrett Park*, 89 Md. 406 (43 Atl. Rep. 813). In support of the power of summary abatement in such case the court cite, *State v. Schlemmer*, 42 La. Ann. 1166 (8 So. Rep. 307; 10 L. R. A. 135); *Commonwealth v. Roberts*, 155 Mass. 281 (29 N. E. Rep. 522); *Baumgartner v. Hasty*, 100 Ind. 575; *King v. Davenport*,



98 Ill. 305; *Mugler v. Kansas*, 123 U. S. 623 (8 Sup. Ct. Rep. 272); *Weil v. Ricord*, 24 N. J. Eq. 169; *Manufacturing Co. v. Wales*, Del. Ch. (34 Atl. Rep. 902); *Deems v. City of Baltimore*, 80 Md. 164-174 (30 Atl. Rep. 648; 45 Am. St. Rep. 339; 26 L. R. A. 541); *State v. Mott*, 61 Md. 298 (48 Am. Rep. 105); *Boehm's Case*, 61 Md. 263-265; Am. & Eng. Enc. Law (2d Ed.) tit. "Abatement of Nuisances."

**Sec. 601. Power of a municipality to destroy property in the abatement of a nuisance.** A city has no right to destroy a building as a means of abating a nuisance resulting from its use as a bawdy house in such manner as renders it a constant source of annoyance to all persons residing in its vicinity and reduces the value of surrounding property. *Bristol Door & Lum. Co. v. City of Bristol*, 97 Va. 304 (33 S. E. Rep. 588; 75 Am. St. Rep. 783). The court say: "Indeed it would require a great stretch of judicial power for a court of equity to sanction the abatement of a building as a nuisance when not the building itself, but only its use, constitutes the nuisance. The law will only permit the abatement of so much of a nuisance as is necessary to prevent the injury. It is only necessary to be rid of the persons who use the buildings for an unlawful or improper purpose, and the law affords ample remedies by indictment and otherwise to accomplish this purpose. In 1 Dil. Mun. Corp. § 376, it is said: 'Power to suppress bawdy houses gives the corporation authority, by implication, to adopt by ordinance the proper means to accomplish the end. But power to the common council of a city to make all such by-laws as it may deem expedient for effectually preventing and suppressing houses of ill fame does not authorize the council to decide that a given house is kept for that purpose; nor, if kept for that purpose, does it authorize the council to order it to be demolished; nor, if thus demolished, will it justify the officers of the city who did it in execution of the ordinance and resolution of the council.' In a case involving this question the court of appeals of New York said: 'A house kept as a house of ill fame, and as a resort for thieves and other disreputable persons, is a public and common nuisance; but the destruction of the building and its furniture is not necessary to its abatement, and is unlawful.' *Ely v. Board*, 36 N. Y. 297.

So, when a building is not kept as clean as it should be, in the interest of public health, the remedy for its wrongful use is ample, and a destruction of the building for that reason would be unlawful. Nor can it justify the destruction of a building that its use diminishes the value of surrounding property. It is not enough that it renders other property less salable, or that it prevents one from letting his premises for as large a rent as he might otherwise do, or to as responsible or respectable tenants. Nor does the fact that a building is unsightly justify its destruction. There are many unpleasant and, indeed, offensive things, that must be borne with by the owners and occupants of estates, because, although offensive to the eye or cultivated taste, they do not trench upon any recognized legal right; and this is the case, even though the thing complained of materially lessens the value of surrounding property. The home of the poor is often unsightly to the eye of those who are able to live in more elegant establishments; but to the humble occupant, who can afford nothing better, it is home. 1 Wood, Nuis. § 3."

**Sec. 602. Remedies and proceedings against nuisances.** One residing upon his premises adjoining a ball park may have an injunction against its use in such a manner as constitutes a nuisance to him. *Cronin v. Bloem-ecke*, 58 N. J. Eq. 313 (43 Atl. Rep. 605). An owner of property occupied by tenants or used for business purposes which is specially injured by the maintenance of a house of ill fame, may have an injunction against it as a nuisance in a court of equity, notwithstanding such nuisance is a crime and punishable as such. *Weakley v. Page*, 102 Tenn. 178 (53 S. W. Rep. 551; 46 L. R. A. 552). A building erected above the height limited by statute (Mass. Stat. 1898, ch. 452) in front of a public park is a purpresture which, while not in a strict and narrow sense a public nuisance, is in the nature of a public nuisance and an information in equity by the state's attorney is the proper remedy for such a wrong. *Attorney General v. Williams*, 174 Mass. 476 (55 N. E. Rep. 77; 47 L. R. A. 314). An action to abate or recover damages on account of a public nuisance cannot be maintained by a private person unless he shows he sustains damages peculiar to himself and different

in kind and degree from those sustained by the public generally. *Baltzeger v. Carolina Midland Ry. Co.*, 54 S. C. 242 (32 S. E. Rep. 358; 71 Am. St. Rep. 789). The right of "any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance" to recover damages or bring an action for its abatement, under Cal. Code Civ. Proc., § 731, is not affected by the fact that a number of other persons suffer similar injuries. *Fisher v. Zumwalt*, 128 Cal. 493 (61 Pac. Rep. 82). Citing, *Wesson v. Iron Co.*, 95 Mass. 95 (90 Am. Dec. 181); *Francis v. Schoellkopf*, 53 N. Y. 154; *Coke Co. v. Thompson*, 39 Ill. 600; *Story v. Hammond*, 4 Ham. 377. A purchaser of premises injured by a nuisance erected previous to his purchase has no remedy for the injury thereto occasioned by such nuisance previous to his acquisition thereof. *Hughes v. General Electric Light & Power Co.*, Ky. (54 S. W. Rep. 723; 21 Ky. Law Rep. 1202). A city is not liable for a nuisance created by the pollution of a stream by its employees and chain gang while operating a rock quarry outside the limits of the city, which its charter gives no authority to operate, unless it is implied from certain provisions which expressly include a denial of liability for the failure to exercise, or the improper exercise of, the powers thereby conferred. *Duncan v. City of Lynchburg*, Va.

(34 S. E. Rep. 964; 48 L. R. A. 331). In an action to recover damages to property on account of a nuisance, evidence of injury to other property from the same cause is not admissible. *Hughes v. General Electric Light & Power Co.*, Ky. (54 S. W. Rep. 723; 21 Ky. Law Rep. 1202). A husband suing for damages on account of his wife's sickness resulting from a nuisance maintained by another, may recover for the loss of her service and the expense of medical attendance. *Adams Hotel Co. v. Cobb*,

Ind. Ter. (53 S. W. Rep. 478). An action for damages for a nuisance created by the construction of a canal changing the course of a stream accrues upon the completion of the canal. *Powers v. St. Louis, I. M. & S. Ry. Co.*, 158 Mo. 87 (57 S. W. Rep. 1090). For particular cases determining the admissibility of evidence in actions for nuisance, see *Chamberlain v. Missouri Elec. Light & Power Co.*, 158 Mo. 1 (57 S. W. Rep. 1021); *Hoadley v. M. Seward & Son Co.*, 71 Conn. 640 (42 Atl. Rep. 997).

**Sec. 603. Permanent or continuing nuisance.** Damages cannot be recovered as for a permanent injury where the nuisance is one which can be removed. *Cleveland, C. C. & St. L. Ry. Co. v. King*, 23 Ind. App. 573 (55 N. E. Rep. 875). See opinion for exhaustive review of authorities on this subject. Where the injury resulting to the property of an abutting owner from a private nuisance, consisting of the construction of a railroad in the street in front of his property, is of a permanent character and such as will continue without change from any cause without human labor, the damage is original and permanent and his right of action exists at once for the recovery of the entire damages, past and future; and the railroad company constructing the road is liable for such damages and not its subsequent lessee operating it. *Guinn v. Ohio River R. Co.*, 46 W. Va. 151 (33 S. E. Rep. 87; 76 Am. St. Rep. 806). See opinion for review of authorities. Placing and maintaining piling in a river whereby water, logs and ice are driven upon the shore of a riparian owner to his injury is in the nature of a continuing nuisance, and successive actions may be brought for the damages as they accrue. *Bowers v. Mississippi & R. R. Boom Co.*, 78 Minn. 398 (81 N. W. Rep. 208; 79 Am. St. Rep. 395). The court say: "The test, whether an injury to real estate by the wrongful act of another is permanent in the sense of permitting a recovery of prospective damages therefor, is not necessarily the character, as to permanency, of the structure or obstruction causing the injury, but the test is whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act. 8 Am. & Eng. Enc. Law, 687; *Uline v. Railroad Co.*, 101 N. Y. 98 (4 N. E. Rep. 536; 54 Am. Rep. 661); *Railway Co. v. Frantz*, 43 O. St. 623 (4 N. E. Rep. 88); *Wells v. Railway Co.*, 151 Mass. 50 (23 N. E. Rep. 724; 21 Am. St. Rep. 423)."

**Sec. 604. Injunction against malicious erection of "structures" on land—Constitutionality and construction of statute—Application to fences.** A statute (Bal. Ann. Wash. Codes & Stat., § 5433; 2 Hill's Ann. Stat. & Codes, § 268) providing that "an injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoin-

ing proprietor; and where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal" is constitutional; and a fence is a "structure" within the meaning of the statute. *Karasek v. Peir*, 22 Wash. 419 (61 Pac. Rep. 33; 50 L. R. A. 345). The court say: "The respondent, as we have stated, bases her claim to an injunction upon the allegation in her complaint that the light has been cut off from her windows, and her house made less rentable, and consequently damaged, by the erection of the fence by the appellant. But neither or both of these effects upon her property constitutes a cause of action in her favor unless they are the result of an unreasonable, and therefore an unlawful, use by the appellant of his own premises. 1 Wood, Nuis. (3d Ed.) pp. 2, 3. At common law a man had a right to build a fence or other structure on his own land as high as he pleases, although he thereby completely obstructs his neighbors' light and air, and the motive by which it is actuated is immaterial. *Rideout v. Knox*, 148 Mass. 368 (19 N. E. Rep. 390; 2 L. R. A. 81; 12 Am. St. Rep. 560); *Mahan v. Brown*, 13 Wend. 261 (28 Am. Dec. 461); *Letts v. Kessler*, 54 O. St. 73 (42 N. E. Rep. 765; 40 L. R. A. 177); *Frazier v. Brown*, 12 O. St. 294; *Fallon v. Schilling*, 29 Kan. 292 (44 Am. Rep. 642); *Chatfield v. Wilson*, 28 Vt. 49; *Lord v. Langdon*, 91 Me. 221 (39 Atl. Rep. 552); *Phelps v. Nowlen*, 72 N. Y. 39 (28 Am. Rep. 93); 2 Wash. Real Prop. (5th Ed.) p. 362. The only exception to this rule of law is found in cases where one has acquired, by long user, a right in the nature of an easement, to have light pass to his windows across the land of his neighbor. But in the United States the courts have, with very few exceptions, repudiated the doctrine of ancient lights, as recognized in England, as 'unsound in principle, and unsuited to the habits and rapid growth of the country.' 1 Wood, Nuis. 196; 6 Am. & Eng. Enc. Law, 152; *Tied Real Prop. (Enlarged Ed.)*, § 613; *Cooley, Torts (2nd Ed.)*, pp. 832, 833; *Parker v. Foote*, 19 Wend. 309; *Pierre v. Fernald*, 26 Me. 436 (46 Am. Dec. 573); *Guest v. Reynolds*, 68 Ill. 478 (18 Am. Rep. 570); *Lapere v. Luckey*, 23 Kan. 534 (33 Am. Rep. 191). An easement of light and air can be acquired in this country only by grant, either ex-

pressed or implied, and no such grant is claimed by the respondent in this case. Whatever right, therefore, she may have to an injunction, is derived solely from the statute, and not from the common law; and, in order to ascertain such right, it is necessary to determine the meaning and validity of the statute. The language employed by the legislature is sufficiently comprehensive to authorize an injunction against the erection by a landowner of a dwelling house or a business block on his own land, providing his motive in so doing is malevolent. If it was the intention of the legislature to prohibit the erection of such structures, we are clearly of the opinion that the statute is, to that extent, at least, unconstitutional; for the reason that to prohibit such a use of real estate would, in effect, deprive the owner of his property without due process of law and compensation. But, inasmuch as it must have been well known to the legislature that useful and valuable structures, such as houses, are rarely or never erected merely to annoy or injure an adjoining owner, we feel justified in holding that it was not the intention to prohibit the erection of such structures as really enhance the value, usefulness, or enjoyment of land, but such only as are primarily or solely intended to injure or annoy an adjoining owner, and which serve no really useful and reasonable purpose. It is well settled that it is the duty of the courts to so construe a statute, if practicable, as to give it force and validity, rather than to render it inoperative or void. *Cooley, Const. Lim. (5th Ed.)*, pp. 220, 222. And we think the construction we have placed upon this section is not inconsistent with its language, and is such as brings it within the power of the legislature, and, as thus construed, the statute is constitutional.

The constitutionality of a statute of Massachusetts providing that 'any fence or other structure in the nature of a fence unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance' (*Stat. 1887, ch. 348, § 1*) was called in question in *Rideout v. Knox*, 148 Mass. 368 (19 N. E. Rep. 390; 2 L. R. A. 81; 12 Am. St. Rep. 560); and the act was held constitutional, for the reason, as

stated by the court, that it simply restrained a noxious use of the owner's premises, and, although the use was not directly injurious to the public at large, there was a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit beyond which it is not lawful to go. In that case it was also held that, in order to maintain an action under the statute, it must be shown that the fence was erected or maintained from an actually malevolent motive, as distinguished from mere technical malice, and that it is not enough to satisfy the words of the statute that malevolence was one of the motives, but that malevolence must be the dominant motive,—a motive without which the fence would not have been built or maintained. In *Lord v. Langdon*, 91 Me. 221 (39 Atl. Rep. 255), which was a case involving the construction of a statute substantially like that of Massachusetts, the supreme court of Maine approved and applied the doctrine announced in *Rideout v. Knox*, 148 Mass. 368 (19 N. E. Rep. 390; 2 L. R. A. 81; 12 Am. St. Rep. 560), and accordingly held that the gist of the action consists in the fact that the structure is maliciously kept and maintained, and that, to entitle the plaintiff to recover, it must be shown that malevolence was the dominant motive, and without which the fence would not have been built or maintained. The Massachusetts statute was again held constitutional in the case of *Smith v. Morse*, 148 Mass. 407 (19 N. E. Rep. 393); but the court there decided that, notwithstanding the use of the word 'nuisance,' the statute did not create an easement in favor of the plaintiff's land, but only made it unlawful to do maliciously what the defendant still had a right to do from other motives. And the same thing may properly be said as to the scope and intention of our statute. In Connecticut there is a statute providing that 'An injunction may be granted against the malicious erection by an owner or lessee of land of any structure upon it, intended to annoy or injure any proprietor of adjacent land in respect to his use or disposition of the same.' Revision 1875, p. 477, § 4. This statute, it will be observed, is in substance similar to the first provision of our statute, and it has been construed by the supreme court of that state in at least two cases. In *Harbison v. White*, 46 Conn. 106, the petitioner sought

the abatement of a structure erected of rough boards at a distance of little more than three feet from his block of houses, and which was eighteen feet high, and of a nature to exclude the light and air, to a great extent, from the basement, lower story, and one-half of the second story of the block, on the ground that it was erected maliciously and with intent to injure and annoy the petitioner, as an adjoining proprietor of land; and, it appearing to the court that it was in fact maliciously erected and was injurious to the petitioner, a mandatory injunction was sustained against its continuance, notwithstanding the fact that it served to screen the defendant's premises from observation. Upon the question of motive, the court said: 'The finding is that malice prompted the erection of the structure in question. That it protected from observation must be regarded as an incident. The statute concerns itself wholly with the motive. Therefore it inquires for that. That found to be malicious, the statute disregards the incident, and puts an immediate end to the wrong by injunction.' In that case, however, nothing was said, except in a very general way, as to the quality or quantum of malice necessary to be shown in order to maintain an action under the statute; but in the subsequent and well-considered case of *Gallagher v. Dodge*, 48 Conn. 387 (40 Am. Rep. 182), the court held that 'the malicious intent must be so predominating as a motive as to give character to the structure,' and that 'it must be so manifest and positive that the real usefulness of the structure will be as manifestly subordinate and incidental.' As to the proof of motive, the court was of the opinion that the question whether the structure was maliciously erected is to be determined by its character, location, and use, rather than by an inquiry into the actual state of mind of the person erecting it. Upon this point the learned court observed: 'We think no rule can be laid down that is on the whole more easy of application, and more likely to be correct in its application, than that the structure intended by the statute must be one which, from its character or location or use, must strike an ordinary beholder as manifestly erected with the leading purpose to annoy the adjoining owner or occupant in his use of his premises.' Although we concede that this rule will generally be more correct



in its application than any other general rule that could be laid down, it is apparent that it cannot be relied on in all cases, to the exclusion of other legitimate evidence. The fence in question in this case is much higher than boundary fences usually are in cities, but it would be very difficult for us to say that an ordinary observer would, from its appearance or character or location, conclude that it was manifestly erected, for the leading purpose, to spite and annoy the respondent; and yet we are clearly of the opinion, from all the evidence in the record, including the character and location of the fence, that malevolence was the dominating motive in its erection. It is true that the appellant, as a witness in his own behalf at the trial, testified that he built the fence to keep out children and chickens, and to support his vines and roses, and not for the purpose of annoying or spiting the respondent. But he virtually admitted on cross-examination that a fence as high as the former one—five feet—would have served as well for such purposes, and that he would not have built the fence as high as he did if the respondent had helped him build a division fence, 'as she should,' and put an eaves trough or gutter on the roof of her house."

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## PARTITION

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### EPITOME OF CASES.

**Sec. 605. Partition by agreement.** A private or secret agreement of partition of realty between tenants in common not fully executed by all of them taking possession in accordance with its terms, is not binding upon a third person to whom one of the tenants in common executes a mortgage upon his undivided interest in the realty, the mortgagee having no notice of such agreement. *Ralph v. Ward*, 109 Ga. 363 (34 S. E. Rep. 610). A voluntary partition, not evidenced by writing, in order to defeat a right to partition under the law, must be clearly proven, and

must be followed by actual possession in severalty of the several parcels, pursuant to such voluntary partition. *Justice v. Lawson*, 46 W. Va. 163 (33 S. E. Rep. 102). The fact that the wife of a joint owner of land has an inchoate right to dower therein does not make her a necessary party to a deed of partition executed by him, as she takes her dower in the part which is assigned to him. *Napper v. Mutual Life Ins. Co.*, Ky. (53 S. W. Rep. 28; 21 Ky. Law Rep. 791).

**Sec. 606. Who may have partition.** A widow to whom an undivided interest in her husband's lands descends in fee may have partition. *Longley v. Longley*, 92 Me. 395 (42 Atl. Rep. 798). An action for partition cannot be maintained by a contingent remainderman. *Smith v. Smith*, Tenn. (57 S. W. Rep. 198). The owner of a life interest in lands cannot maintain an action for partition against the owner of the estate in remainder; and a decree in such a case setting over a part of the property in fee simple is wholly void. *Love v. Blauw*, 61 Kan. 496 (59 Pac. Rep. 1059; 48 L. R. A. 257; 78 Am. St. Rep. 334). Partition may be had of property bought by several persons together, the title to which is placed in one of them under a contract that two others having interests therein should have the control and management of the property for the purpose of improving and selling the same, where one of the parties having the management of the property becomes insane and incapable of attending to the business. *Bissell v. Peirce*, 184 Ill. 60 (56 N. E. Rep. 374). Under Ala. Laws 1896-97, p. 17, one out of possession may sue in equity to establish a disputed title in realty, and to have a sale for partition. *Brown v. Hunter*, 121 Ala. 210 (25 So. Rep. 924). In Kansas, upon the death of the head of a family leaving children, some of whom are minors, who occupy the homestead, it cannot be partitioned before the minor children become of age, against their objection. *Trumbly v. Martell*, 61 Kan. 703 (60 Pac. Rep. 741); *Rowe v. Rowe*, 61 Kan. 862 (60 Pac. Rep. 1049). Under Pa. Laws 1842, p. 234, § 9, providing that proceedings in partition "may be instituted by persons having a legal or equitable life estate in any real estate," it is held that the action may be maintained by one in whom there

is vested an indefeasible estate for the life of another in present possession. *Holmes v. Fulton*, 193 Pa. St. 270 (44 Atl. Rep. 426). Although devisees of land are authorized by the will under which they hold to make partition of the property, a partition made by them after one of their number has conveyed his interest to a third party is not binding upon the latter, and such a devisee is not a necessary or proper party to an action for partition. *Bal. Ann. Wash. Codes & Stat.*, §§ 6357, 6361 construed and applied. *McGowan v. Smith*, 22 Wash. 625 (61 Pac. Rep. 713). Under *Wis. Rev. Stat.* 1898, § 3101, one who through his ownership in fee of an undivided interest in premises and a life estate in the remaining interest is entitled to the possession of the entire premises, cannot maintain partition against the remaindermen. *Pabst Brewing Co. v. Melms*, 105 Wis. 441 (81 N. W. Rep. 882; 76 Am. St. Rep. 921).

**Sec. 607. Partition of oil and gas.** Partition of oil and gas owned by co-owners separate from the surface cannot be decreed, except by sale and division of the proceeds; and a judicial partition thereof by assignment of the oil and gas under sections of the surface is void. *Brannon, J.*, dissenting. *Hall v. Vernon*, 47 W. Va. 295 (34 S. E. Rep. 764; 49 L. R. A. 464). The opinion of the court is rendered by Justice Brannon, who dissents from the conclusion reached, but *Dent*, President of the court, in a review of the authorities, says, among other things, in support of its decision, the following: "In the case of *Kemble v. Kemble*, 44 N. J. Eq. 454 (11 Atl. Rep. 733), it was held that 'a partition of lands containing mineral deposits cannot be ordered if the location, extent, and value of such deposits cannot be ascertained.' *Franklinite Co. v. Condit*, 19 N. J. Eq. 394; *Grubb v. Bayard*, 2 Wall. Jr. 81 (Fed. Cas. No. 5849). If such is the case with solid minerals, how absurd it is to even talk of partitioning in kind oil or gas of whose existence, quantity, and location the court is in entire ignorance! And, if three owners of such a right can have partition in kind, they can transfer their interests to others, without regard to numbers, until they would be of such multitude that an attempted partition in kind would entirely destroy the use of the surface to the owner

of the land, and yet there exist neither oil nor gas to be partitioned. Such a partition as was attempted to be made in this case was a mere nullity, as it partitioned nothing; and yet it operates as a cloud on plaintiff's rights, in fraud of which it was procured by the defendant Vernon. It being so plainly in excess of the powers of a court of equity, it was proper to set it aside on motion, petition, or in any other way its illegality could be presented to the court from which it was procured, without the necessity of resort to an appeal. It was not only voidable, but void, because it undertook to accomplish the impossible. Equity never undertakes to divide the unseen or invisible, but only that which it can see and measure so as to produce equality. Air, gas, water, and oil are not susceptible of partition in kind, independent of land, either when hidden beneath the surface or floating above it, but only when reduced to actual possession and control. Neither are the rights and privileges to acquire possession of these fugitive substances susceptible of partition in kind, but they may be sold, and the proceeds thereof divided. The land under which the oil and gas are supposed to exist may be partitioned in such manner among the co-owners of the surface as to effect a division of the gas and oil privileges, but not in the manner attempted in the present decree. *Franklinite Co. v. Condit*, 19 N. J. Eq. 394."

**Sec. 608. Partition by administrator.** Unless authorized by statute an administrator cannot maintain an action for partition of real estate held by his decedent at the time of his death as tenant in common with others; and Cal. Code Civ. Proc., § 1581, is held not to confer this authority upon him. *Ryer v. Fletcher-Ryer Co.*, 126 Cal. 482 (58 Pac. Rep. 908). In support of the first proposition the court say: "In *Freem. Co. Ten.*, § 454, it is said: 'An administrator, though the estate be shown to be insolvent, has no such seizin in the land of the deceased as entitles him to apply for partition.' The same rule is laid down in 2 *Woerner, Adm'n* (2nd Ed.), pp. 1244, 1245, § 567. It is, we believe, universally held that the administrator of an estate has no such interest in the land as entitles him to institute partition proceedings unless power is expressly given him by statute, as in Indiana and Utah. *Whitlock*

v. Willard, 18 Fla. 166; Foster v. Newton, 46 Miss. 661; Speer v. Speer, 14 N. J. Eq. 240; Nason v. Willard, 2 Mass. 478; Richards v. Richards, 136 Mass. 126; Tindal v. Drake, 51 Ala. 578; Campau v. Campau, 19 Mich. 116; Beecher v. Beecher, 43 Conn. 560; Throckmorton v. Pence, 121 Mo. 58 (25 S. W. Rep. 843); Nelson v. Haisley, 39 Fla. 145 (22 So. Rep. 265); Garrison v. Cox, 99 N. C. 478 (6 S. E. Rep. 124). In the case of Whitlock v. Willard, 18 Fla. 166, it is said: 'In the matter of partition in equity, however, we cannot see where, either before or since the statute of this state controlling this subject, an administrator can be held to have such right; and we have been unable, in our examination, to find a single case which sustains such proposition. On the contrary, the law as announced, so far as we know, without exception, under every statutory policy, is that he cannot.'

**Sec. 609. Partition of lands of decedent while estate is in hands of administrator.** Construing and applying Miss. Code 1892, § 3097, providing that tenants in common who have an estate in possession or right of possession may bring a partition suit, it is held that tenants in common of the lands of a decedent may have partition thereof, although the estate is in the administrator's hands and there are unpaid debts. Garret v. Colvin, 77 Miss. 408 (26 So. Rep. 963). The court say: "Possession or the right of possession in the tenants gives an absolute and unconditional right to partition, however inconvenient it may be to make it. It might be better for all parties, and doubtless would be the more convenient way, to pay all debts before a partition is made, but such payment of debts is not a condition of the exercise of the right. The statute does not impose such limitation. In New Hampshire, where the statute gives a right to partition among tenants in common, whether in possession, remainder, or reversion, in terms very similar to our statute in regard to tenants in possession, the court, on this question, say, 'Their [the tenants'] right to partition is not affected by the circumstance that the administrator, if the estate is insolvent, is entitled to the rents and profits pending the administration, nor that he has the right, by a license by a court of probate, to sell the property for the payment of debts,

though it could not often be expedient to commence such a proceeding under such circumstances.' *Kelly v. Kelly*, 41 N. H. 501." Where an administrator of an estate who is made a party in his personal capacity as an heir of his decedent to a suit to partition land, files a pleading in his official capacity showing the necessity of selling the lands to make assets to pay debts, it may be treated as a cross-petition to have enough of the proceeds of the land appropriated to pay the debts unpaid by personal assets, and the remainder divided among the heirs. *Parks v. Van Dergriff*, Tenn. (57 S. W. Rep. 177).

**Sec. 610. Partition proceedings—Complaint and parties.** A complaint alleging that the plaintiff and certain named defendants are seized in fee simple of certain interests in the lands of the deceased owner, but which contains no allegation of possession of the premises by the plaintiff or by any of the defendants, nor of joint tenancy or tenancy in common by any of them, is insufficient, under N. Y. Code Civ. Proc., §§ 1532, 1533. *Doane v. Mercantile Trust Co.*, 160 N. Y. 494 (55 N. E. Rep. 296). R. I. Gen. Laws, ch. 265, § 20 construed and applied—partition between persons holding the fee and persons entitled to any interest or estate for life, in reversion or any remainder—parties. *Aylesworth v. Crocker*, 21 R. I. 436 (44 Atl. Rep. 308). Particular petition for partition held sufficient. *Schwartz v. Ritter*, 186 Ill. 209 (57 N. E. Rep. 887). A trustee in a deed of trust given to secure a debt is a necessary party to proceedings to partition the land embraced in the conveyance. *Conrad's Adm'r v. Fuller*, 98 Va. 16 (34 S. E. Rep. 893). Remaindermen under a will as to whom it works a conversion of realty into personalty have no vested interests in the real estate and are not necessary parties. *Salisbury v. Slade*, 160 N. Y. 278 (54 N. E. Rep. 741). A wife who is not made a party to an action to partition her deceased father's real estate is not bound by a judgment allotting her share in such real estate to her husband. *Black v. Black*, Ky. (51 S. W. Rep. 456; 21 Ky. Law Rep. 403).

**Sec. 611. Practice in action for partition—Miscellaneous notes—Statutes construed.** Until the defendant files

his answer or a decree pro confesso is regularly entered against him, it is error for the court to decree partition between the parties. *Ropes v. McCabe*, 40 Fla. 388 (25 So. Rep. 273). The fact that a share of the partitioned premises is awarded to some of the parties as cotenants, cannot be objected to by other parties not interested in such share. *Godwin v. Banks*, 89 Md. 679 (43 Atl. Rep. 863). A decree setting apart to minors village lots 18½ feet wide and running back 600 feet from the street, made after two reports of other commissioners that the property was indivisible, will not be sustained on appeal. *Phillips v. Phillips*, 185 Ill. 629 (57 N. E. Rep. 796). The pendency of partition proceedings in which the plaintiff alleges legal title to a certain interest in the land, which is admitted, is not a bar to a subsequent proceeding by him to enforce a resulting trust in his favor in a larger interest in the land. Mass. Pub. Stat., ch. 178, §§ 35, 63 construed and applied. *Weeks v. Edwards*, 176 Mass. 453 (57 N. E. Rep. 701). The effect of a partition in which a mortgagee is joined as a party, is to substitute for an undivided interest in the whole land the portion set off to the mortgagor in severalty; and the lien of the mortgage which was theretofore upon an undivided interest, falls upon the particular portion so set off and apportioned to the mortgagor. A partition decree fixing the rights of a mortgagee and a mortgagor, entered upon their agreement, is binding upon them. *Rochester Loan & Banking Co. v. Morse*, 181 Ill. 64 (54 N. E. Rep. 628). Persons who have mortgaged their undivided five-sixths interest in land who afterward seek partition of the land before a sale under the mortgage on the ground that the property would be sacrificed if sold subject to the outstanding interest, have the burden of showing that such would be the result of such a sale. *Wharton v. Campbell*, Va. (34 S. E. Rep. 47). A purchaser from the original plaintiff in partition, being a privy in estate with him, may maintain an action to revise and correct the proceedings under which he holds title. *Holmes v. Fulton*, 193 Pa. St. 270 (44 Atl. Rep. 426). An award of commissioners in partition not shown to be partial or unfair will not be disturbed on appeal; and adult parties to whose attorneys an erroneous interlocutory order for partition was submitted, may be estopped to question it on

confirmation of the commissioners' return and after considerable expense has been incurred. *Godwin v. Banks*, 89 Md. 679 (43 Atl. Rep. 863). A purchaser from a divorced husband of his interest in lands formerly held by him and his wife as tenants in common takes subject to her right to be reimbursed for expenses incurred in redeeming the land from a mortgage foreclosure and the payment of taxes, where he fails to establish the fact that he was a purchaser without notice and for value; and she may enforce her rights in a suit for partition brought by him. *Fritz v. Ramspott*, 76 Minn. 489 (79 N. W. Rep. 520).

Ga. Civ. Code, § 4790 construed and applied—notice of execution of writ of partition. *Ralph v. Ward*, 109 Ga. 363 (34 S. E. Rep. 610). Ga. Civ. Code, §§ 4785, 4791, 4796 construed and applied—power of court—right to jury trial. *Brown v. Mooney*, 108 Ga. 331 (33 S. E. Rep. 942). Minn. Gen. Stat. 1894, § 5776, providing that the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties, does not require that each of the portions shall be of the same average quality per acre; but all that the statute means is that quality and quantity shall both be taken into consideration in making the division, so that justice may be done to all of the parties by allotting to them portions of equal value. *La Motte v. Mohr*, 78 Minn. 127 (80 N. W. Rep. 850). Construing Mo. Rev. Stat. 1899, § 7133, providing that in case a majority of persons entitled to land do not reside in any county in which the land is situate, "or all of them are nonresidents of the state, the proceedings for partition shall be had in the circuit court of that county in which an equal or greater part of such premises may be," it is held that the statute is mandatory; and that the "equal or greater part of such premises" referred to in the statute means area and not value. *Johnson v. Detrick*, 152 Mo. 243 (53 S. W. Rep. 891). 2 Mo. Rev. Stat. 1855, p. 1112, § 8; p. 1223, § 7 construed and applied—service of process in partition proceedings. *Westmeyer v. Gallenkamp*, 154 Mo. 28 (55 S. W. Rep. 231; 77 Am. St. Rep. 747). N. H. Pub. Stat., ch. 243, providing a method for the partition of real estate held in common, is cumulative and not exclusive of the general equitable



jurisdiction of the court to effect a partition. *Hale v. Jaques*, 69 N. H. 411 (43 Atl. Rep. 121). *Purd. Pa. Dig.*, p. 606, pl. 185 construed and applied—naming parties in petitions, decrees and notices. *Reid v. Clendenning*, 193 Pa. St. 406 (44 Atl. Rep. 500). For particular cases determining questions of practice in partition proceedings, see *Kalteyer v. Wipff*, 92 Tex. 673 (52 S. W. Rep. 63); *Bridwell v. Bridwell*, Ky. (53 S. W. Rep. 1050; 21 Ky. Law Rep. 1025).

**Sec. 612. Judgment in partition.** An interlocutory judgment in partition becomes final and conclusive where the right to appeal therefrom given by Mo. Laws 1895, p. 91, is not exercised. *Windes v. Earp*, 150 Mo. 600 (51 S. W. Rep. 1044). A judgment of partition voidable on account of fraud, until set aside is a complete defense to a subsequent action to partition the same land. *Sanders v. Price*, 56 S. C. 1 (33 S. E. Rep. 731). A decree fixing the interests of the respective parties in the real estate and ordering its sale, is conclusive upon their rights up to that time although no sale was made under it. *Moy v. Moy*, 111 Ia. 161 (82 N. W. Rep. 481). *Minn. Gen. Stat. 1894*, § 5778 construed and applied—effect of judgment in partition on rights of tenants in dower or by curtesy or for life. *Hanson v. Ingwaldson*, 77 Minn. 533 (80 N. W. Rep. 702; 77 Am. St. Rep. 692). A decree partitioning lands of an intestate among his heirs which fails to adjust advancements, as provided by Hill's Ann. Or. Laws, §§ 3104, 3105, will bar the right of the parties thereto to adjust an advancement arising by a previous conveyance of land by the testator to some of their number, where the failure to raise this question was not the result of fraud and none of them knew at the time of the decree that such a conveyance was made as an advancement. *Belle v. Brown*, 37 Or. 588 (61 Pac. Rep. 1024).

**Sec. 613. Attorney's fees and owelty.** In Arkansas an attorney acquires no lien on land by obtaining a partition thereof. *Weatherford v. Hill*, Ark. (56 S. W. Rep. 448). The court, in its discretion under Ind. Rev. Stat., 1894, § 1222 (Rev. Stat. 1901, § 1222), may order a plaintiff's attorney's fees taxed against his share instead

of against the whole estate. *Bell v. Shaffer*, 154 Ind. 413 (56 N. E. Rep. 217). N. C. Code, § 1900, preventing the enforcement of the payment of owelty from land partitioned to an infant cotenant until he reaches his majority, does not bar the enforcement of owelty against land inherited by infants from an adult who owned the land at the time the owelty was made a charge against it. *Powell v. Wheathington*, 124 N. C. 40 (32 S. E. Rep. 380).

**Seq. 614. Partition sales.** A court will not decree a partition sale of partnership real estate, over the objection of the other partners, in order to give one partner his share, where it appears that the land has been in the market for a long time and cannot be sold without great loss, and it is possible to set off to the partner seeking partition, the value of his share in land. *Craighead v. Pike*, 58 N. J. Eq. 15 (43 Atl. Rep. 424). Ky. Civ. Code Prac., § 490, subd. 2, which authorizes a vested estate in real property jointly owned by two or more persons to be sold by an order of a court of equity when the estate is in possession, and cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein, does not authorize the court to disregard a provision in a deed to the effect that the property embraced in it shall not be alienated or incumbered until the youngest child shall arrive at the age of twenty-one. *Young v. Young*, Ky. (49 S. W. Rep. 1074; 20 Ky. Law Rep. 1741). When, after real estate has been sold under a decree in partition, and the purchase money has been paid into court, but before the delivery of the deed, one of the parties to the suit injures or removes fixtures which passed by the sale, the purchaser may have the same rescinded, or, at his election, the court may, in the partition suit, award him compensation for damages sustained out of the share of the purchase money in its hands belonging to the transgressing party. *Oliver v. Lansing*, 59 Neb. 219 (80 N. W. Rep. 829). Where a partition sale has been made regularly in accordance with the order of sale, it will not be set aside unless there has been some fraud, accident or mistake which has affected the transaction. Nor should such a sale be set aside and confirmation refused because the parties to partition proceedings, since the time of the

sale and before confirmation, have adjusted their differences in regard to the property by one of them purchasing the interests of the others. *Boston & M. R. R. Co. v. Langdon*, 68 N. H. 467 (44 Atl. Rep. 603).

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## PARTNERSHIP REAL ESTATE

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### EPITOME OF CASES.

#### **Sec. 615. What constitutes partnership real estate.**

A partnership is not created by a contract for farming on the shares. *Shrum v. Simpson*, 155 Ind. 160 (57 N. E. Rep. 708; 49 L. R. A. 792); *Cedarberg v. Guernsey*, 12 S. Dak. 77 (80 N. W. Rep. 159). An agreement between two persons to buy land on their joint account, which should be placed in charge of one of them, who is to remove and dispose of the timber thereon, and, after payment of the expenses, apply the profits to the discharge of their joint obligation for the purchase price, creates a partnership, so as to render them both liable for amounts due persons employed by the one having charge of the land to saw timber thereon. *Tanner v. Hughes*, Ky. (50 S. W. Rep. 1099; 21 Ky. Law Rep. 77). A partnership, according to the intention of the parties, may be formed for the purpose of one transaction alone in real estate; that is, the buying of one tract or more of land at the same time, and selling it for profit. *Spencer v. Jones*, 92 Tex. 516 (50 S. W. Rep. 118; 71 Am. St. Rep. 870). Citing, *Yeoman v. Lasley*, 40 O. St. 190; *Hulett v. Fairbanks*, 40 O. St. 233; *Winstanley v. Gleyre*, 146 Ill. 27 (34 N. E. Rep. 628); *Canada v. Barksdale*, 76 Va. 899; *Richards v. Grinnell*, 63 Ia. 44 (18 N. W. Rep. 668; 50 Am. Rep. 727); *Chester v. Dickerson*, 54 N. Y. 1 (13 Am. Rep. 550); *Simpson v. Tenney*, 41 Kan. 561 (21 Pac. Rep. 634); *Holmes v. McCray*, 51 Ind. 358 (19 Am. Rep. 735); *Hunter v. Whitehead*, 42 Mo. 524; *Pennybacker v. Leary*, 65 Ia. 220 (21 N. W.

Rep. 575). Particular facts held insufficient to establish a partnership in real estate. *Mayfield v. Turner*, 180 Ill. 332 (54 N. E. Rep. 418).

**Sec. 616. When partnership realty will be treated as personalty.** Partnership real estate is regarded as personal property for the purpose of paying debts and closing the partnership business; and individual creditors of the surviving partner have no right to apply such real estate to their claims until the firm creditors have been satisfied or in some manner have waived their rights in the property. *First Nat. Bank v. State Sav. Bank*, 123 Mich. 321 (82 N. W. Rep. 125). The equitable status as personalty of partnership real estate terminates upon the dissolution of the partnership, so that the interest of a partner therein descends as realty, although the stipulated term of the partnership has not expired. *In re Robinson's Estate*, 191 Pa. St. 239 (43 Atl. Rep. 207). The purchase of land with partnership money to be used in carrying on the partnership business of farming, does not constitute the conversion of the land into personalty, so as to deprive a partner's widow of dower therein. *Oliver's Assignee v. Oliver*, Ky. (49 S. W. Rep. 473; 20 Ky. Law Rep. 1430). Land acquired by a partnership in the course of its business and with its funds will be treated as personal property belonging to the partnership; and a mortgage executed thereon by one partner in the partnership name to secure a partnership debt is valid, although the other partner is a married woman and although the partner executing the mortgage affixes a third person's name thereto as an attesting witness without the latter's authority, where the creditor taking the mortgage does so in good faith and acts thereon to his detriment. *Long v. Slade*, 121 Ala. 267 (26 So. Rep. 31).

# PARTY WALLS

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## EPITOME OF CASES.

**Sec. 617. Contracts concerning party walls.** A contract by one making excavations on a lot adjacent to a building by which he acquires permission to extend its foundations under the wall of such building, in which he stipulates at his own expense to support and sustain the wall of said building during the excavating and putting in of the foundation for his building, does not make him liable for damages subsequently accruing to the original building by the natural settling of the wall. *Kramer v. Northern Hotel Co.*, 185 Ill. 612 (57 N. E. Rep. 847). The covenants in a party wall agreement between adjoining land owners in which it is agreed that one of them may build the wall at his own expense and the other is to pay one-half the cost when he builds, and upon such payment the parties to become joint owners, and which contract expressly provides that it is to be binding on the parties, their heirs and assigns, run with land; and the successor in title of the party building the wall may recover compensation for its use by the other party or his assigns. *Noble v. Kendall*, Mich. (79 N. W. Rep. 810). See opinion for citation of conflicting authorities. A conveyance by a land owner of adjoining land in which he reserves the right to allow a cornice to project over the grantee's land and grants to them the right to "use my wall to build against or upon, if they wish to build," together with the right to remove the projecting cornice if they wish to build higher, does not give the grantees the right to remove bricks from the grantor's wall and insert timbers for the support of their building. *Simonds v. Shields*, 72 Conn. 141 (44 Atl. Rep. 29). An owner of a wall who permits one building upon an adjoining lot to use the same in the construction of his building with an understanding between them that if the latter is not entitled to the use of

the wall he should be held liable in damages, afterward cannot demand the removal of the building, but he may recover in equitable proceedings one-half of the value of the wall. *Wilford v. Gerard*, Ky. (56 S. W. Rep. 416). Citing, *Campbell v. Mesier*, 4 Johns. Ch. 335 (8 Am. Dec. 570); *Sanders v. Martin*, 2 Lea, 213 (31 Am. Rep. 598).

**Sec. 618. Miscellaneous notes.** A wall built by the owner of one of two adjoining lots on the boundary line between them, as a common foundation of two houses built on the lots, will be treated as a party wall. *Nippert v. Warneke*, 128 Cal. 501 (61 Pac. Rep. 96). A prescriptive right to use a wall as a party wall is limited to the use made during the prescriptive period. *Wilford v. Gerard*, Ky. (56 S. W. Rep. 416). 2 N. J. Gen. Stat., p. 2443, concerning party walls, is operative only as to walls within its title. *Rector, Wardens and Vestrymen of Church of Holy Communion v. Paterson Extension R. Co.*, 63 N. J. L. 470 (43 Atl. Rep. 696).

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## PLATS AND SURVEYS

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### EPITOME OF CASES.

**Sec. 619. Miscellaneous notes.** In case of a contest as to the boundary line between a street and the abutting lots, the original survey will control the recorded plat. *Thrush v. Graybill*, 110 Ia. 585 (81 N. W. Rep. 798). An unofficial tracing or copy of a map is not admissible in evidence. *Ellison v. Barnstrator*, 153 Ind. 146 (54 N. E. Rep. 433). For construction of particular plat, see *Maher v. Brown*, 183 Ill. 575 (56 N. E. Rep. 181). A plat or diagram of land or premises, shown to be approximately correct, may be used, on a trial of any kind before a court or jury, to illustrate and apply the evidence, or, in argument, to

show the claim of a party, but is not of itself evidence. It is so only in connection with the evidence of witnesses. *King v. Jordan*, 46 W. Va. 106 (32 S. E. Rep. 1022). The approval of the plat of a proposed addition to a city by the common council does not constitute an acceptance of the streets thereon laid out, or amount to an act of jurisdiction over them, or impose an obligation upon the city to keep them in repair, although such plat vests the fee of the streets therein described in the city, and the charter of the city provides that it shall be unlawful to make or file any such plat without the approval of the common council. *Downend v. City of Kansas City*, 156 Mo. 60 (56 S. W. Rep. 902; 51 L. R. A. 170). An alleged lake is not conclusively shown to be a body of water by the mere fact that it is meandered by a United States surveyor and designated as a lake on a plat of his survey. *Western & Hawaiian Inv. Co. v. Farmers' & Traders' Nat. Bank*, 35 Or. 298 (57 Pac. Rep. 912). Substantially the same is held in *French-Glenn Live-Stock Co. v. Springer*, 35 Or. 312 (58 Pac. Rep. 102).

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## POSSESSION

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### EPITOME OF CASES.

**Sec. 620. Possession defined.** In defining possession, the supreme court of Oklahoma, in the case of *Foust v. Territory*, 8 Okla. 541 (58 Pac. Rep. 728), say: "We invite attention to the following definitions of 'possession': Judge Black says possession is 'the detention and control of or the normal or ideal custody of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercised it in one's place and name. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all other persons.' Black,

Law Dict. 914. 'The detention or enjoyment of a thing which a man holds or exercises by himself or by another who keeps or exercises it in his name. It implies exclusive enjoyment.' 18 Am. & Eng. Enc. Law, 840. 'Possession is one degree of title, though the lowest, and is such an interest in land that one who has the bare possession may maintain ejectment against a mere wrongdoer who intrudes into the possession.' *Swift v. Agnes*, 33 Wis. 228. 'Possession means simply the owning or having a thing in one's own power, and it may be actual or it may be constructive. Actual possession exists where the thing is in the immediate occupancy of the party. Constructive is that which exists in contemplation of a law without actual personal occupation.' *Brown v. Volkening*, 64 N. Y. 80. 'A possession is something more than a mere right or title, whether to a present or future estate. It implies a present right to deal with the property at pleasure, and to exclude other persons from meddling with it. \* \* \* There can be no possession, actual or constructive, by an owner of an estate in lands, without at least the right to actual possession as against any other person.' *Sullivan v. Sullivan*, 66 N. Y. 37." A vendee taking possession of a part of a tract of land under his contract of purchase thereby acquires constructive possession of it all. *Walker v. Arnold*, 71 Vt. 263 (44 Atl. Rep. 351).

**Sec. 621. Possession as notice of rights and title.**

Peaceable possession of land raises a presumption of ownership, *Hammond v. Doty*, 184 Ill. 246 (56 N. E. Rep. 371); and is notice to the world of the possessor's rights therein, *Stillings v. Stillings*, 67 N. H. 584 (42 Atl. Rep. 271); *Draper v. Taylor*, 58 Neb. 787 (79 N. W. Rep. 709); *Beattie v. Crewdson*, 124 Cal. 577 (57 Pac. Rep. 463); *Wiggenhorn v. Daniels*, 149 Mo. 160 (50 S. W. Rep. 807). Possession of land by a child in pursuance of a parol gift by his father is notice of his rights, to a subsequent mortgagee of the father. *Sanford v. Davis*, 181 Ill. 570 (54 N. E. Rep. 977). The general rule that possession of land is notice of one's rights therein, does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he had any interest in the land conveyed; but if a fraud has been perpetrated, and the



facts and circumstances are such as to put the purchaser upon inquiry, and to create reasonable grounds for believing that a mistake has been made or a fraud perpetrated, he will not be in a position to avail himself of the above rule. *Smith v. Phillips*, 9 Okla. 297 (60 Pac. Rep. 117). To the same effect is the case of *Stevenson v. Campbell*, 185 Ill. 527 (57 N. E. Rep. 414). The rights of a grantor remaining in possession who subsequently takes a reconveyance from his grantee, containing a condition that he is to support the latter for life, which is duly recorded and dated back as of the date of the first deed, are superior to the title of one subsequently purchasing at an attachment sale who had notice that the grantor claimed under an unrecorded deed, although the sale was made on an attachment levied intermediate the recording of the deeds. *Zuber v. Johnson*, 108 Ia. 273 (79 N. W. Rep. 76). Possession of land by one holding under a contract of purchase for a short time immediately prior to his receiving a deed is notice of his contract and of the deed afterward executed to him under it. *Scheuer v. Kelly*, 121 Ala. 323 (26 So. Rep. 4).

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## POWER OF ATTORNEY

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### EPITOME OF CASES.

**Sec. 622. Authority conferred by power of attorney—Execution of power—Revocation.** An attorney is not authorized to sell and convey by a power empowering him "to demand and receive of and from any person or persons all such real and personal estate," as his principal may be entitled to as son and heir of another. *Hotchkiss v. Middlekauf*, 96 Va. 649 (32 S. E. Rep. 36; 43 L. R. A. 806). Authority to relinquish dower or to estop a widow from claiming the same is not conferred by a power of attorney authorizing one to represent her and her interest in her husband's estate, "with full power to do and perform all

acts necessary to promote and protect her interest therein." *Welch v. McKenzie*, 66 Ark. 251 (50 S. W. Rep. 505). A deed executed by "Waldemar Arens," as an attorney for the grantors, will not be deemed prima facie their act by virtue of a power of attorney given to "Waltimore Arens." *Moore v. Allen*, 26 Colo. 197 (57 Pac. Rep. 698; 77 Am. St. Rep. 255). Where a power of attorney prescribing no particular form of conveyance to be executed by the agent is duly executed by a husband and wife authorizing the conveyance of her lands, a conveyance by the attorney of such land, otherwise duly executed, will not be held ineffectual because the husband is not named in the deed. *Ellison v. Barnstrator*, 153 Ind. 146 (54 N. E. Rep. 433). A power of attorney to attend to a farm, collect the rents, apply them to the necessary expenses, and turn the balance over to the principal, which does not impose any obligation on the attorney to make advances, may be revoked at the will of the principal, although the attorney in fact has made advances. *Smith v. Dare*, 89 Md. 47 (42 Atl. Rep. 909).

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### STATUTORY PROVISIONS.

[In Vol. IV, §§ 591-632; Vol. V, §§ 644-651; Vol. VI, §§ 689-690, will be found a compilation of the statutory provisions of the several states and territories concerning powers of attorney. Below we give such amendments, changes and additional constructions as have been made.]

#### **Sec. 623. Georgia.**

(See Vol. IV, § 598.) A power of attorney from a corporation, authorizing an agent to convey land by deed in this state, signed by two directors and the secretary, and unaccompanied by the seal of the corporation, or by proof that the directors and secretary were authorized by the charter to sign for the corporation, is insufficient to authorize the agent to convey land by deed in this state. See opinion for particular affidavit for the probate of such a power of attorney before consul of the United States held insufficient to admit the instrument to record. *Dodge v. American Freehold Land Mortg. Co.*, 109 Ga. 394 (34 S. E. Rep. 672).

**Sec. 624. New Mexico.**

(See Vol. IV, § 617.) Either the husband or wife may execute a power of attorney without the other joining. Laws 1901, p. 115, § 20. Powers of attorney and instruments revoking them are required to be acknowledged, certified and recorded the same as deeds and other instruments affecting real estate. Laws 1901, p. 115, § 21.

**Sec. 625. Rhode Island.**

Construing and applying Gen. Laws, ch. 202, § 2; ch. 233, § 6, it is held that a lease of land for a longer period than one year cannot be made by an attorney in fact without written authority. *Bourne v. Campbell*, 21 R. I. 490 (44 Atl. Rep. 806).

**Sec. 626. Tennessee.**

(See Vol. IV, § 625.) Under Shannon's Code, § 3679, a deed signed by the attorney's name only is sufficient to convey the title of his principal, where it shows clearly on its face the capacity in which he was acting. *McCreary v. McCorkle*, Tenn. (54 S. W. Rep. 53).

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## PUBLIC LANDS

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### EPITOME OF CASES.

**Sec. 627. Indians and public lands.** A member of a tribe of Indians cannot maintain ejectment in his name on behalf of the tribe, nor can such an action be maintained by the tribe itself, where it has no corporate name in which to institute the suit, except it be authorized by the legislature so to do. *Johnson v. Long Island R. Co.*, 162 N. Y. 462 (56 N. E. Rep. 992). The tribal Indians on the White Earth Indian reservation in Minnesota have, under their treaties with the United States, and the acquiescence of the state for over thirty years, a license to hunt and fish on the reservation, in their usual and traditional manner, in order to procure food for themselves, notwithstanding that the state laws prohibit such fishing and hunting. *Start, C. J., and Mitchell, J., dissenting. State v. Cooney*,

77 Minn. 518 (80 N. W. Rep. 696). Where a patent conveying lands to an Indian under the provisions of law contained a proviso that "said lands shall never be sold by the patentee or his heirs, without the consent of the secretary of the interior for the time being," said patentee died, and the lands were partitioned among his heirs, and the one to whom the land in controversy was allotted sold and conveyed the same to another one of the heirs of the patentee, with the consent of the secretary of the interior, it is held that the Indian title thereto then became extinguished, and it henceforth could be transferred as other lands. *Blauw v. Love*, 9 Kan. App. 55 (57 Pac. Rep. 258). One in possession of a mining claim on an Indian reservation to whom a patent is given after the reservation is opened up by treaty may previous thereto effect such a dedication of a part of the land for a public highway as he cannot revoke after the granting of the patent. *City of Deadwood v. Whitaker*, 12 S. Dak. 515 (81 N. W. Rep. 908). 26 U. S. Stat., 95 (Act Cong., May 2, 1890) construed and applied—execution sale of improvements on lands in Indian Territory belonging to an adopted citizen of an Indian tribe or a person in the territory who is not a citizen thereof. *Mays v. Frieberg*, Ind. Ter. (49 S. W. Rep. 52); *Daugherty v. Bogy*, Ind. Ter. (53 S. W. Rep. 542). Ind. Ter. Comp. Laws 1892, art. 10, § 226 construed and applied—exemption from execution of improvements on the public domain of the Cherokee Nation. *Hastings v. Whitmer*, 2 Ind. Ter. 335 (51 S. W. Rep. 967). Supp. U. S. Rev. Stat., p. 898, § 5 construed and applied—descent of lands to heirs of Indians—presumption as to legitimacy. *McBean v. McBean*, 37 Or. 195 (61 Pac. Rep. 418). A child who is the offspring of a white father and an Indian woman is not by birth an Indian, but is a citizen of the United States, and is not entitled to the benefit of the act of congress of February 8, 1887 (1 Supp. Rev. Stat. U. S., p. 534, § 4). *Keith v. United States*, 8 Okla. 446 (58 Pac. Rep. 507). For the determination of the true meaning and proper construction of the words "public domain," as used in the Cherokee statute of limitations, see *Rush v. Thompson*, 2 Ind. Ter. 557 (53 S. W. Rep. 333). U. S. Rev. Stat., § 2147 (Ind. Ter. Ann. Stat. 1899, § 4357) construed

and applied—powers of Indian agents. *Quigley v. Stephens*, Ind. Ter. (54 S. W. Rep. 814).

**Sec. 628. Conclusiveness of decisions of land department—Power of state courts.** The decisions of the land department on questions of fact are not subject to review by the courts. *Wormouth v. Gardner*, 125 Cal. 316 (58 Pac. Rep. 20); *Acers v. Snyder*, 8 Okla. 659 (58 Pac. Rep. 780); *Cook v. McCord*, 9 Okla. 200 (60 Pac. Rep. 497); *Rogers v. De Cambra*, 132 Cal. 502 (60 Pac. Rep. 863). Upon this subject the supreme court of Washington, in the case of *Wiseman v. Eastman*, 21 Wash. 163 (57 Pac. Rep. 398), say: "The extent of the authority of the courts to review the decisions of the land department, and for what causes patents to lands will be set aside, or a trust declared, by the courts, has frequently been a subject for judicial determination. While it is settled that the power exists, the courts have always been slow to exercise it. Indeed, our attention has been called to no case where a patent has been set aside, or a trust declared, where the charge was fraud, imposition, or false testimony practiced upon the land department. On the other hand, where the charge was mistake or misconstruction of law, the courts have exercised more liberality, though even here it is held the mistake or misconstruction must be clearly manifest, and not founded upon a possible finding of the facts different from that put upon them by the land department. The doctrines governing this branch of the law can be no better stated than by citations from the authoritative cases.

In *Quinby v. Conlan*, 104 U. S. 420, Mr. Justice Feld, speaking for the court, said: 'It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the land department on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied the parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentation and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action.

On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330-340; *Moore v. Robins*, 96 U. S. 530. And we may also add in this connection that the misconstruction of the law by the officers of the department, which will authorize the interference of the court, must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them; and, where fraud and misrepresentations are relied upon as ground of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegations of fraud and misrepresentations will not suffice.' In *Vance v. Burbank*, 101 U. S. 514, the court said: 'It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department, so that it may properly be said that there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents, even, are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. *United States v. Throckmorton*, 98 U. S. 61; *Marquez v. Frisbie*, 101 U. S. 473. The decision of the proper officers of the department is in the nature of a judicial determination of the matter in dispute.' In the same case it is held that the appropriate officers of the land department have been constituted a special tribunal to decide questions of this character, and that their decisions are final to the same extent that those of judicial or quasi judicial tribunals are final. In *United States v. Throckmorton*, 98 U. S. 61, it is held that the acts for which a court of equity will, on account of fraud, set aside or annul a judgment or decree between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter in which the decree was rendered; and 'that the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or

on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases.' The same court, in *United States v. Des Moines Nav. & Ry. Co.*, 142 U. S. 510 (12 Sup. Ct. Rep. 308), said: 'It is urged that there is an express averment that the navigation company and its grantees are not and never were bona fide purchasers of the lands, or any part thereof. But such a general averment, though repeated once or twice, is to be taken as qualified and limited by the specific facts set forth to show wherein the transaction between the state and the navigation company was fraudulent. Where a bill sets out a series of facts constituting a transaction between two parties, a demurrer admits the truth of those facts, and all reasonable inferences to be drawn therefrom, but not the conclusion which the pleader has seen fit to aver.' In the case of *Coal Co. v. Evans*, 25 C. C. A. 543 (80 Fed. Rep. 425), it is said: 'The doctrine is too well settled to admit of any controversy that the decisions of that tribunal [the land department] upon questions properly pending before it can only be annulled when such fraud or imposition is shown to have been practiced as prevented the unsuccessful party in the contest from fully presenting his case, or the officers composing the tribunal from fully considering it, or when such officers have themselves been guilty of fraudulent conduct, or when it is made to appear that, upon the case as established before the land department, the law applicable thereto was misconstrued or misapplied. If fraud is charged as a ground for annulling a decision of the land department, it is not enough that false testimony or forged documents have been employed, but it must be made to appear that such false testimony has affected the decision, and led to a result which otherwise would not have been reached. And, inasmuch as the findings of the land department on questions of fact are conclusive, when the charge is made that the land department has erred in the decision of a mixed question of law and fact, what the facts were, as laid before and found by the department, must be shown, so as to enable the court to see clearly that the law has been misconstrued.' See, also, *Lee v. John-*

son, 116 U. S. 48 (6 Sup. Ct. Rep. 249); *Marquez v. Frisbie*, 101 U. S. 473; *Moore v. Robbins*, 96 U. S. 530; *Shepley v. Cowan*, 91 U. S. 330; *Johnson v. Towsley*, 13 Wall. 72; *United States v. Atherton*, 102 U. S. 372; *Baldwin v. Stark*, 107 U. S. 463 (2 Sup. Ct. Rep. 473); *Catholic Bishop of Nesqually v. Gibbon*, 158 U. S. 155 (15 Sup. Ct. Rep. 779); *Gonzales v. French*, 164 U. S. 338 (17 Sup. Ct. Rep. 102)."

The decision of the secretary of the interior as to who is entitled to a patent, rendered on appeal, cannot be attacked collaterally, on the ground that he did not read the evidence presented, but rendered his decision in accordance with the conclusions of the clerks of his department who had read the evidence. *Rogers v. De Cambra*, 132 Cal. 502 (60 Pac. Rep. 863). U. S. Rev. Stat., § 2297 construed and applied—jurisdiction of land department of contests—causes for which contest may be instituted. *Lawrence v. Potter*, 22 Wash. 32 (60 Pac. Rep. 147); *Wiseman v. Eastman*, 21 Wash. 163 (57 Pac. Rep. 398). Courts have no jurisdiction to adjust equities between rival claimants to public lands until the United States has parted with its title. *McCord v. Hill*, 104 Wis. 457 (80 N. W. Rep. 735). The state courts have jurisdiction of an action to quiet title, pending the determination of a contest of plaintiff's title before the United States land department, dependent on whether the lands are agricultural or mineral, and of which question the land department only has jurisdiction, and the court will delay its judgment until the decision of such question by the land department. *Potter v. Randolph*, 126 Cal. 458 (58 Pac. Rep. 905). Where two parties have been claimants to a tract of public land, and the adverse claims have been finally disposed of in the land department, and the successful claimant is permitted to make his homestead entry, such entryman then becomes entitled to the undisturbed possession of the tract as against the unsuccessful claimant, and the courts will, by mandatory injunction, when necessary, enforce his rights. *Barnett v. Ruyle*, 9 Okla. 635 (60 Pac. Rep. 243); *McDonald v. Brady*, 9 Okla. 660 (60 Pac. Rep. 509). And in the last case cited it is held that where the court is satisfied of the correctness of the rulings of the land department, and renders its judgment to give effect to the same, it will not



stultify itself or compromise its judgment by withholding from the successful party a portion of the relief to which he is entitled, in order to enable the unsuccessful party to wage some future independent action to test the correctness of its conclusions and judgment.

**Sec. 629. School lands—Statutes construed.** A grant by congress of lands "to the state for the use of schools" is not a grant upon a condition subsequent, but is an absolute grant, vesting the title in the state for the special purpose. *Schneider v. Hutchinson*, 35 Or. 253 (57 Pac. Rep. 324; 76 Am. St. Rep. 474). Act. Cong, Mar 3, 1853, construed and applied—grant of agricultural lands to the state for school purposes—conclusiveness of determination of United States officials as to the land being agricultural. *Saunders v. La Purisima Gold-Min. Co.*, 125 Cal. 159 (57 Pac. Rep. 656). Ten years adverse possession of school lands prior to the enactment of Ala. Laws 1876-77, p. 102, created title as against the holder of a patent title to such land from the township trustee. *Tennessee Coal, Iron & R. Co. v. Linn*, 123 Ala. 112 (26 So. Rep. 245). *Sand. & H. Ark. Dig.*, § 7119 construed and applied—sale of school lands to be for cash—resale upon purchaser's failure to pay. *Brown v. Toler*, 66 Ark. 361 (50 S. W. Rep. 696). *Miss. Code*, § 4148 construed and applied—presumption as to regularity of lease or sale of school lands, arising from twenty-five years adverse possession. *Leflore Co. v. Bush*, 76 Miss. 551 (25 So. Rep. 351). *Tex. Rev. Civ. Stat.*, § 4218j; Laws 1897, p. 184, ch. 129, construed and applied—classification of school lands—when sale effective. *Gracey v. Hendrix*, 93 Tex. 26 (51 S. W. Rep. 846). *Tex. Laws* 1895, p. 63 construed and applied—power of commissioner to make regulations as to the sale of school lands—rejection of application. *Willoughby v. Townsend*, 93 Tex. 80 (53 S. W. Rep. 581). See opinion as to requisites of affidavit of application to purchase school lands. *Tex. Laws* 1897, ch. 37 construed and applied—forfeiture of purchase of school lands for nonpayment of interest—constitutionality of statute. *Sandifer v. Wilson*, 93 Tex. 232 (54 S. W. Rep. 898). 2 *Batt's Tex. Rev. Stat.*, § 4218y construed and applied—sale of "isolated and detached" sections or parts of sections of school

lands—forfeiture and resale. *State v. Rogan*, Tex. (54 S. W. Rep. 1016). Since Tex. Laws 1879, ch. 28, as amended by Laws 1881, ch. 105, authorizing “any person” to become a purchaser of school lands at a sale thereof, does not expressly authorize minors to become purchasers, a sale by the land commissioner to a minor, although, he complies with the law, creates no binding contract which can be enforced against the state by one who succeeds to the minor’s rights by purchase under an order of the probate court. *State v. Rogan*, 93 Tex. 248 (54 S. W. Rep. 1018). Tex. Rev. Stat., §§ 4218f-4218fff construed and applied—sale of school land to actual settlers—rights of one buying from a settler. *Schwarz v. McCall*, Tex. (57 S. W. Rep. 31).

**Sec. 630. Mining claims—What constitutes “mining ground.”** When a mining corporation, in good faith, works by ordinary mining processes deposits of stone or other mineral on land owned by it, with a view to utilizing the product for commercial purposes, the land thus worked and exploited as “mining ground,” within the meaning of Cal. Laws 1880, p. 131, making it unlawful for such corporations to sell, lease or mortgage any part of their “mining ground, \* \* \* unless \* \* \* ratified by the holders of at least two-thirds of the capital stock,” whether the undertaking results in loss or profit, and whether sound judgment and discretion would approve that use of the land. *Johnson v. California Lustral Co.*, 127 Cal. 283 (59 Pac. Rep. 595). The court say: “We suppose there can be no doubt that an actual mine—land subjected to the processes of mining—is ‘mining ground,’ in the sense of the statute. What, then, is a ‘mine,’ or what is ‘mining?’ In *Rex v. Inhabitants of Sedgley*, 2 Barn. & Adol. 65, the question was whether certain property from which limestone was obtained, by means of tunnelling and other excavations, to be used in smelting iron and in the manufacture of lime, constituted a mine. The court (per Lord Tenterden, C. J.), having adverted to an attempt by counsel to restrict the term ‘mine’ to works for the extraction of metals, proceeded: ‘If the existence of metal be necessary to constitute a mine, salt works, from which salt is obtained in the way this stone was obtained, will not be mines, nor in-

deed, will coal works be mines. \* \* \* And to deny the character of a mine to the works in question would, as it appears to us, be to depart from the ordinary and proper meaning of that word in the English language.' In *Rex v. Brettell*, 3 Barn. & Adol. 424, the court held that similar works for obtaining fire-brick clay were a mine, saying: 'In order to determine whether an excavation in the earth constitutes a mine or not, we are to look to the mode in which the article is obtained, and not to its chemical or geological character.' In *Westmoreland Coal Co.'s Appeal*, 85 Pa. St. 344, it was held that, as to coal, a worked vein is a mine, and the court said: 'By working the vein it becomes a mine.' In *Hartwell v. Camman*, 10 N. J. Eq. 128 (64 Am. Dec. 448), it was held that paint stone found in strata below the surface of the soil, distinct from the ordinary earth, and worked by ordinary means of mining, will pass by the designation of 'mines and minerals' in a deed. In *Ball v. Tolman*, 119 Cal. 358 (51 Pac. Rep. 546), dredging the bed of a navigable river for gold—which operations yielded no returns whatever—was yet held to be mining, and among the reasons assigned for the decision was that the method adopted was among the modes of placer mining. In *Hines v. Miller*, 122 Cal. 517 (55 Pac. Rep. 401), it was held that one engaged in the construction of shafts, tunnels, and the like, for prospecting and developing a mine, is engaged in mining as much as he who extracts gravel or ore from the mine. Suppose the shafts and tunnels should fail to strike profitable ore or gravel (which was probably the fact in *Hines v. Miller*, as the action was to enforce liens for unpaid labor done on the ground); would the operations be any the less 'mining?' Or suppose some expert should testify that the ground explored was worthless for any purpose of profit; we think his opinion would hardly justify the conclusion that the ground was not in fact mined, assuming, of course, that the operations were prosecuted in good faith."

**Sec. 631. Mining claims—Location and relocation.**

The interest of a locator in a mining claim prior to the time he becomes entitled to a patent is not real estate or an interest in land, within the meaning of a statute (Hill's Ann. Or. Laws, § 382) prescribing limitations for actions

to determine an interest in real property. *Herron v. Eagle Min. Co.*, 37 Or. 155 (61 Pac. Rep. 417). But in Montana, it is held that the provisions of Code Civ. Proc., § 1732, authorizing a stay of execution pending an appeal from a judgment directing the delivery of possession of real estate, applies in case of an appeal by defendant in ejectment involving an unpatented mining claim. *State v. Second Judicial Dist. Court*, 24 Mont. 330 (61 Pac. Rep. 882). The court say: "Neither the statutes nor the courts in this state recognize any distinction between possessory rights to mining claims upon public lands, and real estate held under other titles. While recognizing the United States as the paramount proprietor, the legislature and the courts have always treated the claimant under a perfected location as the owner of the fee. Indeed, the location operates as a grant from the government; and the estate acquired under it is a vested right to the fee, which becomes absolute upon the performance of the required conditions. It can be lost only by abandonment, or by forfeiture and location by another. It is property in every sense of that term, and except in the particular just noted, it has all the attributes of real estate. It may be transferred by sale, as other real estate; it may be mortgaged; it may descend to the heir, or be held by the administrator or executor as assets to pay debts; it may be made liable to the payment of taxes; it is subject to statutory liens; in some instances it may be subject to the claim of homestead; and it is subject to levy and sale as other lands for the satisfaction of judgments." A relocation of a mining claim made by some of several cotenants owning it inures to the benefit of all of them. *Van Wagenen v. Carpenter*, Colo. (61 Pac. Rep. 698). For exhaustive note on this point, see 50 L. R. A. 184-186. Under U. S. Rev. Stat., § 2320, no right can be acquired to a quartz claim before the discovery of a vein or lode within its limits; but the finding of ore or metalliferous rock in place in a defined vein is sufficient to satisfy the statute, although it does not contain ore in paying quantities. If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man in spending his time or money upon it, it is sufficient, as against a subsequent locator for mining purposes. *Muldrick v. Brown*, 37 Or. 185 (61 Pac. Rep. 428). Colo. Gen

Stat., § 2400 construed and applied—filing of additional certificate of location—sufficiency of description. *Duncan v. Fulton*, Colo. App. (61 Pac. Rep. 244). *Mills' Colo. Stat.*, § 3150 (*Gen. Stat.*, § 2399), providing that "the discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated," is complied with by his depositing with the proper officer within the time limit his location certificate. *Shepard v. Murphy*, 26 Colo. 350 (58 Pac. Rep. 588). For exhaustive note on "Lodes or veins within placer claims," see 50 L. R. A. 289-296.

**Sec. 632. Mining claims—Marking boundaries—Notice of location—Description.** Where, at the time of the location of certain mining claims, notices were posted thereon, and subsequently recorded in the record of the mining district, and the claims were marked by monuments, so that the boundaries could be readily ascertained, the location was valid. *Risch v. Wiseman*, 36 Or. 484 (59 Pac. Rep. 1111; 78 Am. St. Rep. 783). Whether or not a mining claim is marked on the ground sufficiently to show a compliance with the first clause of § 2324, U. S. Rev. Stat., providing that "the location must be distinctly marked on the ground so that its boundaries can be readily traced," is a question of fact, to be determined from proof aliunde, and the manner of marking is not required to be stated in the notice. *Farmington Gold-Min. Co. v. Rhymney Gold & Copper Co.*, 20 Utah, 363 (58 Pac. Rep. 832; 77 Am. St. Rep. 913). And in this case, the court, in discussing the remainder of this section, which provides that "all records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim," say: "With just how much accuracy the description of a mining claim, in reference to a natural object or permanent monument, must be stated in the notice of location, is not set forth in the statute, and where, as in this case, the location was evidently made in good faith, we are not disposed to hold the locator to a very strict compliance with the law in respect

to his location notice. If by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient. Prospectors, as a rule, make no pretensions of scholarship or of the art of composition, are neither surveyors nor lawyers, and if, in their notice of location, technical accuracy of expression were an absolute requirement, the object of the law, which doubtless is the encouragement and benefit of the miners, would in many cases be frustrated, and injustice would result, by the disturbing of possession after much hard labor performed and money in good faith expended. Therefore mere imperfections in the notice of location will not render it void. Courts have usually construed the statute respecting the location of mining claims with much liberality, and the sufficiency of the location, with reference to natural objects or permanent monuments, is simply a question of fact. *Lindl. Mines*, §§ 381, 383; *Erhardt v. Boaro*, 113 U. S. 527 (5 Sup. Ct. Rep. 560); *Bennett v. Harkrader*, 158 U. S. 441 (15 Sup. Ct. Rep. 863); *Brady v. Husby*, 21 Nev. 453 (33 Pac. Rep. 801); *Flavin v. Mattingly*, 8 Mont. 242 (19 Pac. Rep. 384); *Gamer v. Glenn*, 8 Mont. 371 (20 Pac. Rep. 654); *Mining Co. v. Callison*, 5 Sawy. 439 (Fed. Cas. No. 9886); *Wilson v. Mining Co.*, 19 Utah, 66 (56 Pac. Rep. 300; 75 Am. St. Rep. 718)."

Where a locator of a mining claim on government land fraudulently antedates his notice of location for the purpose of defeating an actual locator thereon, such location is fraudulent as against such rightful claimant, and is also fraudulent as against the government. The date of the location required to be given in the notice means the correct date, and not a fictitious or fraudulent date. *Muldoon v. Brown*, 21 Utah, 121 (59 Pac. Rep. 720). In the construction of a notice of location there is no rule of necessity, such as exists in the construction of a deed, which requires that the term "easterly," used without qualifying language, shall denote due east, and the term "westerly" shall denote due west. *Witsee v. King of Arizona Min. & Mill. Co.*, Ariz. (60 Pac. Rep. 896). A location notice of a mining claim which fails to give the direction of the initial point, or permanent monument to which it is attempted to tie the location, from the point

of discovery, is void, under the statutes of Idaho. Clearwater Short-Line Ry. Co. v. San Garde, Ida. (61 Pac. Rep. 137), following, Brown v. Levan, Ida. (46 Pac. Rep. 661). Mont. Pol. Code, § 3612 construed and applied—filing declaratory statement of location of mining claim—sufficiency of description. Purdum v. Laddin, 23 Mont. 387 (59 Pac. Rep. 153). For construction of Mont. Comp. Stat. 1887, div. 5, § 1477 on this subject see Power v. Sla, 24 Mont. 243 (61 Pac. Rep. 468). For a discussion of the sufficiency and construction of notices of location of mining claims, see Bramlett v. Flick, 23 Mont. 95 (57 Pac. Rep. 869); Wiltsee v. King of Arizona Min. & Mill. Co., Ariz. (60 Pac. Rep. 896).

**Sec. 633. Mining claims—Doing required amount of Work—Forfeiture and relocation.** Construing and applying U. S. Rev. Stat., § 2324, providing for the forfeiture of a mining claim if "less than one hundred dollars' worth of labor shall be performed or improvements made during each year," it is held that one alleging the forfeiture of a mining claim under the statute by a prior locator must show not only his nonperformance of the required amount of work and labor, but must negative the expenditure of that amount in improvements. Power v. Sla, 24 Mont. 243 (61 Pac. Rep. 468); Providence Gold-Min. Co. v. Burke, Ariz. (57 Pac. Rep. 641). Construing a further provision in this section that "the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the \* \* \* amount of work necessary to hold possession of a mining claim," it is held that a custom among miners in a certain district that twenty days labor shall constitute one hundred dollars' worth of work, is in violation of the statute, and void. Penn v. Oldhauber, 24 Mont. 287 (61 Pac. Rep. 649). Although the owner of a mining location, originally valid, has failed in his assessment work, so that the ground is open to relocation, yet if, before any valid relocation is made by others, or after the abandonment of a valid relocation, the original locator or his grantee resume possession, and does the necessary work, his rights are revived under the original location.

Assessment work for a mining claim may be done on an adjoining claim, where it is shown that it was intended for such claim, and that the work done would inure to its benefit. *Klopestine v. Hays*, 20 Utah, 45 (57 Pac. Rep. 712). An entryman of a mining claim who makes his final entry and obtains the receiver's receipt showing that he is entitled to a patent, through fraud, is not relieved from doing the annual representation work; and where such a receipt is cancelled and he has failed to do such work, the claim is subject to relocation. *Murray v. Polglase*, 23 Mont. 401 (59 Pac. Rep. 439). See opinion for exhaustive discussion of this subject.

**Sec. 634. Mining claims—Conflicting locations—Adversary proceedings.** If a person has held, occupied and possessed mineral land under color of title, in pursuance of law and the local rules and regulations of the mining district for more than twenty years prior to an attempted adverse location, it is not then public mineral land, and such attempted location may be enjoined. *Risch v. Wiseman*, 36 Or. 484 (59 Pac. Rep. 1111; 78 Am. St. Rep. 783). Where the original discovery of a vein upon which a mining location is based is included within the surface boundaries of a junior location, which goes to patent without protest from the owners of the prior location, but before such patent a new discovery has been made on the prior location, without the boundaries of the junior location as patented, and within the surface boundaries of the prior location as originally located, and development work is being there prosecuted in good faith by the owners of the prior location, their claim is valid, and holds as to all ground not included in the patent of the junior location, notwithstanding the loss of the original discovery. A court having obtained jurisdiction of all parties to an adverse suit for possession of a mining claim may grant full relief and restore possession to the party entitled thereto. *Silver City G. & S. Min. Co. v. Lowry*, 19 Utah, 334 (57 Pac. Rep. 11). For an exhaustive discussion as to the construction and application of U. S. Rev. Stat., §§ 2322, 2323, 2336, defining and determining the rights of locators as to intersecting, crossing or uniting veins, see *Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co.*, 10 Colo. (59



Pac. Rep. 607; 50 L. R. A. 209, and note). And as to the right of an apex proprietor to follow the dip of his vein, under § 2322, see *Butte & B. Min. Co. v. Societe Anonyme Des Mines*, 23 Mont. 177 (58 Pac. Rep. 111; 75 Am. St. Rep. 505). U. S. Rev. Stat., § 2326 construed and applied—action to establish adverse claim to a mining location—as to when and how objection that action was not brought within thirty days may be raised. *Providence Gold-Min. Co. v. Marks*, Ariz. (60 Pac. Rep. 938). U. S. Rev. Stat., § 2326; 21 U. S. Stat. 505; Supp. U. S. Stat., § 1868 construed and applied—action to determine rights of adverse mining claimants—jury trial. *Providence Gold-Min. Co. v. Burke*, Ariz. (57 Pac. Rep. 641); *Murray v. Polglase*, 23 Mont. 401 (59 Pac. Rep. 439).

**Sec. 635. Swamp and tide lands—Statute construed.**

Of two county patents to swamp land, both apparently regular, held by opposite parties in ejectment, on an issue at law the senior must prevail over the junior. *Simpson v. Kilpatrick*, 148 Mo. 507 (50 S. W. Rep. 435). A decision by the United States land department that certain land is swamp land, within the meaning of the "Swamp Land Grant" (Act Cong., Sept. 28, 1850), and the issue of a patent to the state accordingly, cannot be attacked collaterally. *Rood v. Wallace*, 109 Ia. 5 (79 N. W. Rep. 449); *Warner Val. Stock Co. v. Calderwood*, 36 Or. 228 (59 Pac. Rep. 115). Act Cong., Sept. 28, 1850, as supplemented by Act, Mar. 12, 1860, constituted a present grant of swamp lands to the various states, and a patent of lands to a state upon determination of their swampy character vests title as of the date of the act. *Warner Val. Stock Co. v. Calderwood*, 36 Or. 228 (59 Pac. Rep. 115). Cal. Pol. Code, §§ 3472, 3477 construed and applied—reclamation of swamp lands. *Carpenter v. San Francisco Sav. Union*, 128 Cal. 516 (61 Pac. Rep. 92); *Miller & Lux v. Batz*, Cal. (61 Pac. Rep. 935). Ill Laws 1854, p. 19 construed and applied—certificate of auditor as to swamp lands. *Grand Pass Shooting Club v. Crosby*, 181 Ill. 266 (54 N. E. Rep. 913). Ia. Laws, 5th Gen. Assem., ch. 138 authorizes the governor of the state to request the United States land commissioner to issue to the state a patent for the swamp lands granted to it under Act. Cong.,

Sept. 28, 1850. *Rood v. Wallace*, 109 Ia. 5 (79 N. W. Rep. 449). Mo. Laws 1868, p. 68; Rev. Stat. 1889, § 8040, construed and applied—grant of swamp and overflowed lands to counties—power of state board of education. *State v. Crumb*, 157 Mo. 545 (57 S. W. Rep. 1030). Or. Laws 1891, p. 189, authorizing and requiring the board of school-land commissioners to sell the tide and swamp lands of the state “to citizens of the state of Oregon,” does not authorize a sale to one who is a resident of the state but not a citizen of the United States, although he had declared his intention to become such. *Spencer v. Carlson*, 36 Or. 364 (59 Pac. Rep. 708). When a person has filed an application for the purchase of tide lands, has paid one-tenth of the purchase price, and has performed all the preliminaries entitling him to a contract therefor, under Wash. Laws 1895, pp. 557, 558, §§ 70, 71, he acquires a vested right, which cannot be taken away by Act Mar. 16, 1897, repealing the former act, and making different provisions for the disposition of said lands. *State v. Bridges*, 22 Wash. 64 (60 Pac. Rep. 60; 79 Am. St. Rep. 914). Wash. Laws 1895, p. 552, § 28 construed and applied—preference right of grantee of upland to purchase tide lands. *Seattle & M. Ry. Co. v. Carraher*, 21 Wash. 491 (58 Pac. Rep. 570). Wis. Rev. Stat. 1878, § 205; Laws 1897, ch. 367; Laws 1899, ch. 345, construed and applied—sale of swamp lands—price. *State v. Commissioners of Public Lands*, 106 Wis. 584 (82 N. W. Rep. 549). Particular case in which a husband was held not to have such an estate of inheritance in swamp lands as would give his wife a right to dower. *Hendrickson v. Grable*, 157 Mo. 42 (57 S. W. Rep. 784).

**Sec. 636. Town-site lands.** A town-lot claimant, who vacates a lot in obedience to an award made by a board of arbitration created under one of the provisional governments for the cities of Oklahoma in 1889, cannot be held by such action to have voluntarily abandoned his claim to said lot. The question as to whether a town lot has been abandoned by a claimant is a question of fact. *Cook v. McCord*, 9 Okla. 200 (60 Pac. Rep. 497). Where settlers have staked town lots, and have attempted to take peaceable possession of them, and have been prevented by

force, by one claiming the rightful possession thereof, from occupying or making any improvements thereon, such an attempt to stake and take possession of such lots is equivalent to the erection of improvements, as against him who prevented by force the staking of the lots and the improvement thereof, and will be regarded as such, against any one attempting to set up a claim by, through or under him who exercised the force, if such attempts at occupancy are not abandoned. *Jackson v. Thornton*, 8 Okla. 331 (58 Pac. Rep. 951).

**Sec. 637. Grants to railroads—Statutes construed.**

Title under the Central Pacific land grant passed to the railroad when the line was definitely fixed, and a transfer subsequent to that time, but before the railroad received a patent, passed title. *Stanton v. Crane*, Nev. (58 Pac. Rep. 53). Act. Cong., July 27, 1866 (14 U. S. Stat., 292) construed and applied—grant of lands to Atlantic & Pacific Railroad Company—indemnity lands granted to supply deficiencies. *Southern Pac. R. Co. v. Wood*, 124 Cal. 475 (57 Pac. Rep. 388). As to the title acquired by the railroad under this grant, see *Owen v. Pomona Land & Water Co.*, Cal. (61 Pac. Rep. 472). For particular cases construing and applying the provisions of the federal statutes (Act Cong., July 1, 1862; Act Cong., July 2, 1864) granting lands to railroads, as to exceptions made in favor of homestead claimants who have made entries on the lands granted before the line of the railroad is fixed, see *Central Pac. R. Co. v. McCann*, 126 Cal. 553 (58 Pac. Rep. 1045); *Howard v. Hibbs*, 22 Wash. 513 (61 Pac. Rep. 159); *Northern Pac. R. Co. v. Nelson*, 22 Wash. 521 (61 Pac. Rep. 703). Upon this subject the supreme court of Montana, in the case of *Murray v. Polglase*, 23 Mont. 401 (59 Pac. Rep. 439), say: "The effect of an entry of public land has also often been considered in the construction of grants by the United States in aid of railroads, where the grant contains a reservation or exception in favor of homestead, pre-emption, or other claims which had attached before the definite location of the line or route of the road. It has always been held by the federal courts, except as hereafter noted, that, as the grant becomes effective only upon the definite lo-

cation of the line of the road, all claims which have attached to lands within the limits of the prior grant to that time, whether valid or not, come within the exception, and are reserved from the operation of the grant. *Railroad Co. v. Whitney*, 132 U. S. 357 (10 Sup. Ct. Rep. 112; 33 L. Ed. 363); *Railroad Co. v. Dunmeyer*, 113 U. S. 629 (5 Sup. Ct. Rep. 566; 28 L. Ed. 1112); *Whitney v. Taylor*, 158 U. S. 85 (15 Sup. Ct. Rep. 796; 39 L. Ed. 906); *Railroad Co. v. Sanders*, 166 U. S. 620 (17 Sup. Ct. Rep. 671; 41 L. Ed. 1139); *Railroad Co. v. Brown*, 21 C. C. A. 236 (75 Fed. Rep. 85). The later case of *Railroad Co. v. De Lacey*, 174 U. S. 622 (19 Sup. Ct. Rep. 791; 43 L. Ed. 1111), however, modifies the rule of the earlier cases cited, so that the exception is held not to apply to preemption claims where claimants have failed to make final proof and payment within the time provided by law. Such claims, though of record in the land office, are held to have been forfeited by operation of law. As to other classes of claims the rule appears to remain unchanged." Act Cong., June 3, 1856, construed and applied—grant of lands to state of Alabama in aid of certain railroads. *McCarver v. Herzberg*, 120 Ala. 523 (25 So. Rep. 3); *Sullivan v. Van Kirk Land & Const. Co.*, 124 Ala. 225 (26 So. Rep. 925).

**Sec. 638. Preemption of public lands for homestead—Rights of contesting claimants as to possession.** A prescriptive right to a highway over public lands can attach while the land is held under a preemption or homestead claim and prior to patent by the United States, under U. S. Rev. Stat., § 2477, providing that "the right of way for the construction of a highway over public lands not reserved for public use is hereby granted." *Smith v. Mitchell*, 21 Wash. 536 (58 Pac. Rep. 667; 75 Am. St. Rep. 858). One who has filed a homestead entry on public lands may make a valid agreement to cancel his entry in order that another may enter the land. *Hooker v. McIntosh*, 76 Miss. 693 (25 So. Rep. 866). Act Cong., June 15, 1880, construed and applied—rights of transferee of homestead entryman. *Woodstock Iron Co. v. Strickland*, 121 Ala. 616 (25 So. Rep. 818). For particular case determining the rights of a corporation and its employee

as to lands pre-empted by the latter, see *Pacific Livestock Co. v. Gentry*, 38 Or. 275 (61 Pac. Rep. 422).

One who is in good faith contesting a homestead entry upon the grounds of prior settlement, and is residing upon the land in controversy, will be permitted to continue to occupy the land in controversy until the land department shall finally determine which of the claimants has the superior right to the land. The courts will then give effect to such decision by requiring the unsuccessful or defeated claimant to surrender possession of the land to the one to whom the land department has awarded it. *Glover v. Swartz*, 8 Okla. 642 (58 Pac. Rep. 943). And the losing party properly cannot claim the right to continue his residence upon the land for the purpose of bringing a suit in equity to declare a trust against his successful adversary, when he has already resided upon the land a sufficient length of time, under the law, to enable him to make final proof for the land. *Endicott v. Ellis*, 9 Okla. 666 (60 Pac. Rep. 501); *Mendenhall v. Cagle*, 9 Okla. 668 (60 Pac. Rep. 505); *Lee v. Ellis*, 9 Okla. 664 (60 Pac. Rep. 509). Mandatory injunction is a proper and appropriate remedy to enforce the rights of an entryman upon public lands as against a trespasser, and one who occupies public land against the will and over the protest of one having a homestead entry upon such land is a trespasser. *Glover v. Swartz*, 8 Okla. 642 (58 Pac. Rep. 943).

**Sec. 639. Mortgaging of homestead lands—Liability for debts.** A mortgage given upon a government homestead after a final certificate has been issued, but before the reception of the patent, is valid. *Smart v. Kennedy*, 123 Ala. 627 (26 So. Rep. 198). Citing, *Lang v. Morey*, 40 Minn. 396 (42 N. W. Rep. 88; 12 Am. St. Rep. 748); *Townsend v. Fenton*, 30 Minn. 528 (16 N. W. Rep. 421); *Moore v. McIntosh* 6 Kan. 39; *Nycum v. McAllister*, 33 Ia. 374; *Cheney v. White*, 5 Neb. 261 (25 Am. Rep. 487); *Kirkaldie v. Larrabee*, 31 Cal. 455 (89 Am. Dec. 205). A mortgage given on public lands by a locator thereon before he has received a patent from the government to pay for improvements placed on the land, is valid, although given to one with whom he has made an invalid contract to enter the land for his benefit and convey it to him after

obtaining title. *Hubbard v. Mulligan*, 13 Colo. App. 116 (57 Pac. Rep. 738). Construing and applying U. S. Rev. Stat., § 2296 concerning homestead entries, which provides that "no land acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," it is held that, notwithstanding this provision, a judgment of a probate court ordering a sale of land, the title to which was acquired under such law, for the payment of debts contracted prior to the issuance of the patent therefor, will be upheld, as against a collateral attack, unless the fact that such debts antedate the patent appears upon the record of the probate court's proceedings. *J. B. Watkins Land-Mortg. Co. v. Mullen*, 62 Kan. 1 (61 Pac. Rep. 385). The statute cannot be invoked to prevent the sale and removal of a building erected on a homestead claim by one residing thereon before he had made final proof, under a statute providing for the sale and removal of buildings as a means of enforcing mechanics' liens against them. *Mahon v. Surerus*, 9 N. Dak. 57 (81 N. W. Rep. 64).

**Sec. 640. Timber culture claims.** The riparian rights of one who claims, by purchase under timber-culture entries, lands appearing to abut on nonnavigable waters, are to be determined by the governmental surveys and plats existing at the time of his purchase. *Warner Val. Stock Co. v. Calderwood*, 36 Or. 228 (59 Pac. Rep. 115). There is nothing in 20 U. S. Stat. 113, governing timber-culture claims which prevents a claimant, who has made his entry in good faith, from contracting to sell his claim prior to the final proof. *Church v. Adams*, 37 Or. 355 (61 Pac. Rep. 639).

**Sec. 641. Patents—Miscellaneous notes.** One who has complied with all the requirements of the law so as to entitle him to a patent upon making final proof, has a complete equitable right to have the legal title vested in him by the government, of which he cannot be deprived by his wife whom he has deserted making the final proof for him, under U. S. Rev. Stat., § 2291, as in case of his death. *Egbert v. Bond*, 148 Mo. 199 (49 S. W. Rep. 873).

Construing and applying U. S. Rev. Stat., § 2269, providing that, upon the death of a party entitled to claim the benefit of the preemption laws "before consummating his claim by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers and complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned," it is held that the title thus given by the patent is not to the estate of the decedent, but to his heirs, who do not take by descent from their ancestor, but as tenants in common by conveyance directly from the United States; and that the land is not subject to devise by the pre-emptor, or to sale or distribution by the probate court. *Wittenbrock v. Wheadon*, 128 Cal. 150 (60 Pac. Rep. 664). Under the statutes of Kentucky, a patent for land previously patented to another is void, and does not confer upon the patentee constructive possession of the land, *Greer v. Bowling*, Ky.

(55 S. W. Rep. 1081; 21 Ky. Law Rep. 1648); *Cornett v. Combs*, Ky. (53 S. W. Rep. 32; 21 Ky. Law Rep. 837); but a patent is not void merely because it excludes prior grants without identifying or describing them, *Breathitt Coal, Iron & Lumber Co. v. Strong*, Ky. (51 S. W. Rep. 189; 21 Ky. Law Rep. 302). The state is not authorized to declare a stream flowing through land granted by it a highway for floating logs and for no other purpose, by a reservation in its patent of a certain number of acres for "highways." *De Camp v. Dix*, 159 N. Y. 436 (54 N. E. Rep. 63).

**Sec. 642. Construction of miscellaneous Acts of Congress and local statutes.** Acts Cong., Mar. 30, 1822; Mar. 2, 1827, applied—Illinois and Michigan canal lands—title of the state. *Werling v. Ingersoll*, 182 Ill. 25 (54 N. E. Rep. 1008). Act Cong. Mar. 3, 1851, construed and applied—Mexican land grants—confirmation by board of land commissioners—rights of Indians. *Harvey v. Barker*, 126 Cal. 262 (58 Pac. Rep. 692). Act Cong. July 17, 1854 (10 U. S. Stat. 304), construed and applied—issue of "half

breed scrip"—location and cancellation of location—authority of secretary of interior. *Midway Co. v. Eaton*, 79 Minn. 442 (82 N. W. Rep. 861). Act Cong. June 2, 1858, construed and applied—issue of certificate to "legal representative of claimant." *Bradley v. Dells Lum. Co.*, 105 Wis. 245 (81 N. W. Rep. 394). Act Cong. June 3, 1878 (20 U. S. Stat. 88), construed and applied—right of citizens and bona fide residents to cut timber from public mineral land—regulations by secretary of interior. *United States v. Copper Queen Consol. Min. Co.*, Ariz. (60 Pac. Rep. 885); *United States v. Gumm*, 9 N. M. 611 (58 Pac. Rep. 398). Act Cong. 1897-98, p. 668 construed and applied—retrocession to Indiana and Illinois of jurisdiction of United States over land acquired for Soldiers' Homes. *State v. Board of Com'rs*, 153 Ind. 302 (54 N. E. Rep. 809).

A donation deed by the state land commissioner of Arkansas merely amounts to a quitclaim deed passing such title as the state at the time has. *St. Louis Refrigerator & Wooden Gutter Co. v. Langley*, 66 Ark. 48 (51 S. W. Rep. 68). For construction of California statutes and ordinances in regard to San Francisco pueblo lands, see *Holladay v. City and County of San Francisco*, 124 Cal. 352 (57 Pac. Rep. 146); *City and County of San Francisco v. Sharp*, 125 Cal. 534 (58 Pac. Rep. 173). 2 Mills' Ann Colo. Stat., § 3634 (Laws 1887, p. 328); 3 Mills' Ann. Colo. Stat., § 3636 (Laws 1895, ch. 87) construed and applied—power of state land board. *Colorado Fuel & Iron Co. v. Adams*, 14 Colo. App. 84 (60 Pac. Rep. 367). An action under *Ida. Rev. Stat.*, § 4556 to recover possession of premises located on the public domain, is not an action of ejectment nor subject to the rules governing actions in ejectment. *Maydole v. Watson*, *Ida.* (60 Pac. Rep. 86). *Ill. Laws 1873-74*, p. 67 construed and applied—lease and sale of commons belonging to towns. *Woods v. Soucy*, 184 Ill. 568 (56 N. E. Rep. 1015). *Mich. Const.*, art. 14, § 9; *Loc. Laws 1897*, No. 423 construed and applied—internal improvements on lands granted to the state. *Gibson v. Commissioner of State Land Office*, 121 Mich. 49 (79 N. W. Rep. 919). *Mo. Rev. Stat. 1879*, §§ 671, 6153, 6154, 6205 construed and applied—jurisdiction of county court to order sale of realty belong-



ing to county—title conveyed by deed executed under its order by a commissioner. *Elliott v. Buffington*, 149 Mo. 663 (51 S. W. Rep. 408). Mont. Code Civ. Proc. 1895, § 494, providing that an action to recover a mining claim, except a lode claim, can be maintained by one only who has been seized or possessed thereof within one year before the bringing of the action, has no application to real estate patented as placer ground. *Horst v. Shea*, 23 Mont. 390 (59 Pac. Rep. 364). Mont. Code Civ. Proc. 1895, § 592, and Laws 1899, p. 134, amending same, construed and applied—operation of mines held by tenants in common—accounting to nonjoining cotenants. *Butte & B. Consol. Min. Co. v. Montana Ore-Purchasing Co.*, 24 Mont. 125 (60 Pac. Rep. 1039). N. M. Laws 1897, § 2938 construed and applied—title to pueblo lands by adverse possession. *Pueblo of Nambe v. Romero*, N. M. (61 Pac. Rep. 122). N. Y. Laws 1818, ch. 155 construed and applied—board of trustees of the proprietors of the undivided lands of the town of Southampton—powers of board and rights of inhabitants. *Trustees, etc. of Town of Southampton v. Betts*, 163 N. Y. 454 (57 N. E. Rep. 762). For the construction of numerous New York statutes as to the force and effect of royal and colonial grants of lands under navigable waters, see *People v. Jessup*, 160 N. Y. 249 (54 N. E. Rep. 682). 23 Ohio Laws, p. 50 construed and applied—title of the state of Ohio to lands appropriated and used by it in the construction and operation of canals. *State v. Griftner*, 61 O. St. 201 (55 N. E. Rep. 612); *Miller v. Wisenberger*, 61 O. St. 561 (56 N. E. Rep. 454). For cases construing numerous public land statutes of Tennessee, see *Duffield v. Spence*, Tenn. (51 S. W. Rep. 492); *State v. Cooper*, Tenn. (53 S. W. Rep. 391). *Sayles' Tex. Civ. Stat.* 1897, § 4045 construed and applied—examination of records in general land office. *Anderson v. Rogan*, 93 Tex. 182 (54 S. W. Rep. 242). 2 Batt's Tex. Rev. Stat., § 4218y construed and applied—sale of isolated and detached fractional sections of public school lands. *Tompkins v. McKinney*, 93 Tex. 629 (57 S. W. Rep. 804); *Weber v. Rogan*, Tex. (57 S. W. Rep. 940). Utah Laws 1899, ch. 64 construed and applied—state board of land commissioners—powers. *Miles v. Wells*, 22 Utah, 55 (61 Pac.

Rep. 534). Miss. Act 1839, authorizing the state to lease certain of its lands, does not empower it to convey a fee in the lands. *Weiler v. Monroe Co.*, 76 Miss. 492 (25 So. Rep. 352). Miss. Laws 1888, ch. 23, § 1 construed and applied—deed of levee commissioners. *Sunflower Land & Mfg. Co. v. Watts*, 77 Miss. 56 (25 So. Rep. 863). Miss. Code 1892, § 2588, as amended by Laws 1896, p. 60, construed and applied—refunding purchase price to purchasers of public lands whose titles fail. *Holder v. Wineman*, 76 Miss. 824 (25 So. Rep. 481).

**Sec. 643. Miscellaneous notes.** As to the right of a proprietor of a mining claim on public lands to erect dams across streams thereon and use their waters in his mining operations, see *Blair v. Boswell*, 37 Or. 168 (61 Pac. Rep. 341); *Turner v. Locy*, 37 Or. 158 (61 Pac. Rep. 342). Particular evidence held sufficient to show the appropriation of the waters of a stream on public lands. *Offield v. Ish*, 21 Wash. 277 (57 Pac. Rep. 809). Grantees of the owner of a Mexican land grant who obtain its confirmation before the recording of a prior grant of an easement thereon by him acquire the whole legal title free from any servitude. *City of Los Angeles v. Pomeroy*, 125 Cal. 420 (58 Pac. Rep. 69).

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## QUIETING TITLE

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JONES v. NIXON.

(102 Tenn. 95.)

Action by vendor to prevent cloud on title which he has conveyed. A vendor of land who has conveyed with covenant of warranty may maintain an action to prevent a cloud on the title of his vendee in possession.

CALDWELL, J.

**Sec. 644. Statement of the case.** This cause comes up on bill and demurrer. For the purposes of this opinion, but one branch of the case need be stated, and as to that

the statement will be brief, and in such form only as will be necessary to present the legal questions to be decided. Complainant S. G. Jones alleges that he was the true and unquestioned owner, in fee, of 1600 acres of land in Hickman county; that he sold that land in parcels to different persons years ago, by absolute deeds, with full covenants of warranty, and put his vendees in possession; that they have since been, and now are, in quiet, open, notorious, and adverse possession of their respective portions of said land, as unconditional owners thereof, but that recently, by some mistake or oversight, without pleading, process, or jurisdiction in respect thereto, the said land has been sold under decree of the chancery court, as a part of the assets of the estate of O. A. Nixon, deceased, to whom no part of it ever belonged; that the defendant Henry Nixon became the purchaser at that sale of the whole 1600 acres for the small sum of \$130, and will soon have his purchase confirmed by the court, and a cloud thereby cast upon the title of complainant's vendees, unless he shall be prevented therefrom by appropriate decree in this cause. Demurrants deny that complainant shows such interest in the land as will entitle him to the relief sought. The chancellor and the court of chancery appeals, successively, overruled the demurrer, and the defendants have appealed the second time.

**Sec. 645. Bills of peace and bills quia timet distinguished—Action by vendor to prevent cloud on title conveyed by him.** The bill, in its essence, is one brought by the rightful vendor of land and warrantor of its title to prevent a cloud upon the title of his vendees in possession. Can such a bill be maintained by such a person, he being without either title or possession? In some important particulars, a close kinship exists between what are known in the books as "bills of peace" and bills quia timet, and in others there is a wide difference between them. The points of similarity and dissimilarity will not be dwelt upon here, however, since the present bill is so plainly and exclusively of the latter kind. In case of *Holland v. Challen*, 110 U. S. 20 (3 Sup. Ct. Rep. 497), Mr. Justice Miller said: "A bill quia timet, or to remove a cloud upon the title of real estate, differed from a bill of

peace, in that it did not seek so much to put an end to vexatious litigation respecting the property as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs and mischiefs, and the jurisdiction of the court was invoked because the party feared injury to his rights and interests. Judge Storey says bills quia timet "are in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are, ordinarily, applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of a Court of Equity, because he fears (quia timet) some future probable injury to his rights and interests, and not because an injury has already occurred which requires any compensation or other relief." 2 Story, Eq. Jur., § 826. It is through bills of this kind, then, that clouds are removed from title to real estate. 3 Pom. Eq. Jur., § 1398; *Holland v. Challen*, 110 U. S. 16 (3 Sup. Ct. Rep. 495); *Hayward v. Dimsdale*, 17 Ves. 111; *Almony v. Hicks*, 3 Head, 39; *Anderson v. Talbot*, 1 Heisk. 408. Strictly speaking, the present bill is not brought to remove a cloud from a title, but it is intended, rather, to prevent the consummation of a proceeding that would, unhindered, result in obscuring that title. The difference is not one of controlling importance, however, for the jurisdiction of courts of equity to grant the desired relief is as well established in the one case as in the other, and the principles authorizing the prevention of clouds are, generally, the same as those applied in removing clouds. *Pettit v. Shepherd*, 5 Paige, 492; *Sanders v. Village of Yonkers*, 63 N. Y. 489; *Lyon v. Alley*, 130 U. S. 177 (9 Sup. Ct. Rep. 480); *O'Hare v. Downing*, 130 Mass. 16; *Shattuck v. Carson*, 2 Cal. 588; *Groves v. Webber*, 72 Ill. 606; *Norton v. Beaver*, 5 Ohio, 178; *Merriman v. Polk*, 5 Heisk. 717. In the last four of those cases, a bill was filed, as in this instance, to prevent the completion of a judicial sale, which, if consummated, would cast a cloud upon the title of the complainant. The courts have been wide apart in their opinions and decisions in relation to the character of the instruments that may be canceled in equity as clouds upon title. Some have maintained the view that such deeds, contracts, and proceedings as appear

upon their face to be void in law are not in fact clouds, and, hence should not be interfered with by a Court of Equity, but left for judgment at law, and that equitable relief should be granted as to such instruments only as appear upon their face to be valid in law, and are shown by extrinsic evidence to be valid. Others have thought and held that equitable relief was warranted alike in each class of cases, and that it should be granted with equal certainty, whether the basis of the challenged claim of the adverse party was absolutely void, or only voidable. This court is one of those that has spoken in favor of the latter view. *Jones v. Perry*, 10 Yerg. 59, 83 (30 Am. Dec. 430); *Almony v. Hicks*, 3 Head, 41; *Porter v. Jones*, 6 Cold. 316. Chancellor Kent thought "the weight of authority and the reason of the thing," both, "in favor of the jurisdiction of the court, whether the instrument is or is not void is law or whether it be void from matter appearing on its face or from proof taken in the cause." *Hamilton v. Cummings*, 1 Johns. Ch. 517. Prof. Pomeroy also prefers the broader view, but thinks the "majority of American decisions" against it. 3 Pom. Eq. Jur., § 1399. Likewise there has been no little contrariety of judicial opinion upon the question whether or not, to entitle him to the relief sought, the party seeking to remove or prevent a cloud on title must be in possession of the land. A discussion of this question at this time is rendered unnecessary by the fact that this court long ago decided that possession by the complainant in such a suit was not essential to the court's jurisdiction, and that relief would be granted him, in a proper case, though out of possession. *Johnson v. Cooper*, 2 Yerg. 525; *Almony v. Hicks*, 3 Head, 42; *Anderson v. Talbot*, 1 Heisk. 410; *Bank v. Ewing*, 12 Lea, 601. With respect to the matter of title, the authorities are almost unanimous. At least, it is an undoubted and well-settled general rule that the party asking relief against a cloud already cast, or one that is impending, must show himself to be the true owner of the legal title before he can justly be awarded that which he seeks. If he does not own the thing obscured, or about to become so, he, generally, has no standing in court. The object of the bill being protection of the true legal title, it is, in ordinary cases, of the essence of his right to the relief that the com-

plainant be the owner of that title. If he be not its owner, he is ordinarily without a basis for the relief sought, and should be repelled. Such, beyond question, is the well-established general rule. *Holland v. Challen*, 110 U. S. 25 (3 Sup. Ct. Rep. 495); *Frost v. Spitley*, 121 U. S. 556 (7 Sup. Ct. Rep. 1129); *Orton v. Smith*, 18 How. 265; *Dick v. Foraker*, 155 U. S. 414 (15 Sup. Ct. Rep. 124); *Davis v. City of Boston*, 129 Mass. 377; *Smith v. Sherry*, 54 Wis. 114 (11 N. W. Rep. 465); *King v. Coleman*, 98 Tenn. 570 (40 S. W. Rep. 1082); *Wilcox v. Blackwell*, 99 Tenn. 352 (41 S. W. Rep. 1061). An exception to this rule is sometimes allowed in favor of the owner of an equitable title when his equity against the defendant is of such a nature "as to draw from him his legal title" (*Coal Creek M. & Manufacturing Co. v. Ross*, 12 Lea, 1), and when he has no other adequate means of protection. Another exception has been made, in some of the courts, in favor of the vendor of land with warranty of title, his obligation to protect the title of his vendee being deemed a sufficient interest in the subject-matter to authorize his timely interposition and warrant the aid of a court of equity. *Ely v. Wilcox*, 26 Wis. 91; *Chamblin v. Schlichter*, 12 Minn. 276 (Gil. 181); *Remer v. Mackay*, 3 Fed. Rep. 86. This exception covers the present case exactly, and under it the bill should be sustained. Jones is bound, by the covenants of his deed, to defend and protect the title of his several vendees, and he ought to be allowed to do so, if he chooses, by an aggressive anticipatory action, rather than wait and make defense to the prospective suit or suits of him who is about to consummate proceedings that will cast a dangerous cloud upon that title. He is undoubtedly an interested party. In reality, it may turn out that he, of all persons, is the one most concerned in the dissipation of the impending cloud, and, being so, a Court of Equity will not be slow to come to his relief. Affirmed.

**Sec. 646. Right of vendor or grantor to maintain action to quiet title.**

One who has conveyed land by warranty deed with full covenants may maintain an action to set aside a subsequent invalid assessment against the property to prevent a cloud on the title. *Pier v. Fond du Lac County*, 53 Wis. 421 (10 N. W. Rep. 686). An action to quiet title

may be maintained by such a grantor where apart of the purchase price is retained until a cloud on the title is removed. *Styer v. Sprague*, 63 Minn. 414 (65 N. W. Rep. 659); *Begole v. Hershey*, 86 Mich. 130 (48 N. W. Rep. 790). And in Kansas, where, as a general rule, the plaintiff in an action to quiet title either must be in possession or have the legal title to the land, it is held that where it appears that the plaintiff has sold to one of the defendants, who withholds a large part of the purchase money until the title to the land is perfected, and the plaintiff is bound by contract to so perfect the title, and where it further appears that such defendant refuses to allow an action for that purpose to be brought in his name, the vendor may bring an action against the vendee and the persons claiming the adverse title or interest, for the purpose of perfecting the title in accordance with his agreement. *Sutliff v. Smith*, 58 Kan. 559 (50 Pac. Rep. 455). In West Virginia it is held that, as a general rule, a party cannot maintain a suit to remove a cloud or a bill quia timet who has no other interest than that he has sold the property with a covenant of general warranty; but, in a case where evidence is about to be lost, of the party's inertia would result in the perfecting of an adverse title, he is not bound to lie by, but may bring his bill of quia timet. *Jackson v. Kittle*, 34 W. Va. 207 (12 S. E. Rep. 484). Ind. Rev. Stat. 1894, § 1086 (Rev. Stat. 1901, § 1086), authorizing any person having the right to recover the possession of any real estate, or to quiet title thereto, in the name of another person or persons, to prosecute either action in his own name, must be construed in connection with § 251, requiring every action to be prosecuted in the name of the real party in interest, and under these statutes it is held that a grantor by warranty deed cannot maintain suit in his own name, to quiet title, against third persons claiming an interest in the land paramount to that conveyed to the grantee. *Chapman v. Jones*, 149 Ind. 434 (47 N. E. Rep. 1065). One who has executed a bond for a deed, and surrendered possession of the land to the obligee, may maintain a bill to set aside a tax deed of the land. *Langlois v. Stewart*, 156 Ill. 609 (41 N. E. Rep. 177). To the same effect, see *Snodgrass v. Parks*, 79 Cal. 55 (21 Pac. Rep. 429).

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#### EPITOME OF CASES.

**Sec. 647.** When the action will lie and who may maintain it. A mere verbal claim to, or assertion of ownership in property, is not such a cloud upon the title of the owner as can be removed by equitable proceedings, *Waters v. Lewis*, 106 Ga. 758 (32 S. E. Rep. 854); but a deed need not be recorded in order to constitute a cloud upon one's

title, *Goodloe v. Black*, Ky. (54 S. W. Rep. 957; 21 Ky. Law Rep. 1286). An owner of land in possession thereof can not maintain an action to cancel as a cloud on his title a conveyance of land executed by a third party whom the county deed records show has no title. *Hannibal & St. J. R. Co. v. Nortoni*, 154 Mo. 142 (55 S. W. Rep. 220). A recorded sheriff's deed, regular on its face, but which in fact is void because the property sold was not the property of the execution debtor, may be cancelled as a cloud upon the title of the owner of the land embraced in it. *Shaw v. Allen*, 184 Ill. 77 (56 N. E. Rep. 403). An abutting owner may maintain an action to quiet his title to an easement in an adjoining way. *Roush v. Roush*, 154 Ind. 562 (55 N. E. Rep. 1017). An owner of land, the legal title to which has been conveyed to him by one previously holding it as trustee for him, may maintain an action to cancel as a cloud on his title an attachment on the land procured against the trustee intermediate the execution and the recording of his deed to the owner. S. Dak. Comp. Laws, §§ 4644, 5449 construed and applied. *Hale v. Grigsby*, 12 S. Dak. 198 (80 N. W. Rep. 199).

In California it is held that the action will lie only against one who claims an interest in the real estate adverse to the plaintiff, and he cannot maintain the action against one who holds the legal title to the land in trust for him. *Yoakam v. Kingery*, 126 Cal. 30 (58 Pac. Rep. 324). Construing and applying Ia. Code, § 4223, providing that "an action to determine and quiet the title of real property may be brought by any one, whether in or out of possession, having or claiming an interest therein, against any person claiming title thereto, though not in possession," it is held that the action may be maintained against a mere lienholder. *Blair v. Hemphill*, 111 Ia. 226 (82 N. W. Rep. 501). Under Mich. Const., art. 6, § 27, guarantying trial by jury, it is held that a bill in equity to quiet title and obtain possession of land without ejectment will not lie. *Chandler v. Graham*, 123 Mich. 327 (82 N. W. Rep. 814). Under the statutes of Michigan (How. Ann. Mich. Stat., § 6626; Laws 1887, No. 260), a bill to quiet title will not lie against one in possession. *Seymour v. Rood*, 121 Mich. 173 (79 N. W. Rep. 1100). The action will not lie under N. C. Laws 1893, ch. 6, to remove as a



cloud on title a judgment in pursuance of which an execution has been levied on the land. *McLean v. Shaw*, 125 N. C. 491 (34 S. E. Rep. 634).

**Sec. 648. Possession by plaintiff required.** In Alabama an action to remove a cloud from a legal title cannot be maintained by one out of possession. *Williams v. Lawrence*, 123 Ala. 588 (26 So. Rep. 647). A bill to cancel a deed for fraud cannot be maintained as a bill to remove a cloud upon the title of the complainant where there is no averment that he was in possession of the land at the date of its filing, and no averment or any special equity showing some obstacle or impediment which would prevent or embarrass the assertion of his rights at law. *Brown v. Hunter*, 121 Ala. 210 (25 So. Rep. 924). A claim of possession based on a rental contract with the tenant of an adverse claimant without the latter's knowledge or consent is not sufficient possession to authorize one to maintain an action to quiet title, under Ala. Code 1896, § 809. *Fleming v. Moore*, 122 Ala. 399 (26 So. Rep. 174). Under Cal. Code Civ. Proc., § 738, an owner of land may maintain the action although he is not in possession. *Casey v. Leggett*, 125 Cal. 664 (58 Pac. Rep. 264). For further construction of this statute, see *Dranga v. Rowe*, 127 Cal. 506 (59 Pac. Rep. 944). In Illinois in order to maintain the action the plaintiff must show either that he is in possession or that the property is vacant and unoccupied. *Glos v. Huey*, 181 Ill. 149 (54 N. E. Rep. 905); *Adams v. Black*, 183 Ill. 377 (55 N. E. Rep. 887); *Figge v. Rowlen*, 185 Ill. 234 (57 N. E. Rep. 195). A complainant who alleges possession at the time of filing his complaint must prove such possession as alleged, and the burden of proof is upon him. *Glos v. Beckman*, 183 Ill. 158 (55 N. E. Rep. 636). Particular evidence held insufficient to show such possession on the part of the plaintiff as will enable him to maintain the action. *Adams v. Black*, 183 Ill. 377 (55 N. E. Rep. 887). In Kentucky the plaintiff must have both title and actual possession. *Smith v. Lewis*, Ky. (55 S. W. Rep. 551; 21 Ky. Law Rep. 1400). One having mere constructive possession of unoccupied and uncultivated lands cannot maintain an action to quiet title thereto, under Mo. Rev. Stat. 1889, § 2092. *Catlin v. Holliday-Klotz Land &*

Lum. Co., 151 Mo. 159 (52 S. W. Rep. 247). In Virginia and West Virginia a bill to quiet title cannot be maintained by one not in possession, *Kane v. Virginia Coal & Iron Co.*, 97 Va. 329 (33 S. E. Rep. 627); *Hitchcock v. Morrison*, 47 W. Va. 206 (34 S. E. Rep. 993); and in Arkansas, one out of possession, claiming an equitable title, cannot maintain a bill against one in possession under claim of title, to remove a cloud on title. *Burke v. St. Louis, I. M. & S. Ry. Co.*, 66 Ark. 646 (50 S. W. Rep. 275).

**Sec. 649. Complaint in an action to quiet title.** A bill in an action by one in possession of land brought under Ala. Code, §§ 809, 810, to compel the determination of claims and to quiet title which alleges that defendants' claim an interest or incumbrance upon the land need not offer to do equity by satisfying any claim or incumbrance which the defendants may have on the land. See opinion for particular description of land in such a bill held sufficient. *Inge v. Demouy*, 122 Ala. 169 (25 So. Rep. 228). Under Mo. Act, Mar. 15, 1897, a complaint in which plaintiff alleges that he is the owner of the land in absolute fee simple; that it is wild land, in the actual possession of no one; that defendant claims a title the precise nature of which the plaintiff does not know, but that such claim of title is adverse to his, is sufficient. *Huff v. Laclede Land & Imp. Co.*, 157 Mo. 65 (57 S. W. Rep. 715). A complaint in an action under 2 Bal. Ann. Wash. Codes & Stat., § 5521, for the purpose of having the claim or interest which the defendant is asserting judicially determined, is sufficient where it alleges a claim by the defendant of an interest in the property and charges that it is unfounded, without specifically setting forth such interest. *Watson v. Glover*, 21 Wash. 677 (59 Pac. Rep. 516). Citing, *Castro v. Barry*, 79 Cal. 443 (21 Pac. Rep. 946); *Ely v. Railroad Co.*, 129 U. S. 291 (9 Sup. Ct. Rep. 293; 32 L. Ed. 688); *Wall v. Magnes*, 17 Colo. 476 (30 Pac. Rep. 56); *Teal v. Collins*, 9 Or. 89. Under a similar statute in California (Code Civ. Proc., § 738) it is held that a plaintiff in such an action against a city claiming a lien on the land on account of a void tax levy will not be required to pay such taxes as a condition precedent to granting him relief. *Dranga v. Rowe*, 127 Cal. 506 (59 Pac. Rep. 944).

**Sec. 650. Defenses and cross petitions.** Construing and applying Ind. Rev. Stat. 1894, § 8624 (Rev. Stat. 1901, § 8624), making a tax deed "prima facie evidence of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, and prima facie evidence of a good and valid title in fee simple in the grantee of said deed," it is held that a tax deed regular on its face constitutes a complete defense to an action by another to quiet title to the land where he does not prove or attempt to prove that the sale was irregular or that the deed was invalid and did not convey title. *Doren v. Lupton*, 154 Ind. 396 (56 N. E. Rep. 849). A cross petition to quiet title is barred by a judgment in ejectment in favor of the plaintiff against the defendant relating to the same lands. *Gage v. Eddy*, 186 Ill. 432 (57 N. E. Rep. 1030).

**Sec. 651. Practice in actions to quiet title—Miscellaneous notes.** The plaintiff must prove title in himself where the defendant's answer denies that he has title. *Memphis Land & Timber Co. v. Stotts*, 68 Ark. 620 (56 S. W. Rep. 873). A mere deed from a third person to the plaintiff without further proof as to possession or title does not prove title. *Glos v. Huey*, 181 Ill. 149 (54 N. E. Rep. 905). In an action under the statutes of Minnesota to determine an adverse claim to real property, brought by a party who claims to be in possession, it is unnecessary for him to prove that he is in possession of all the land described in the complaint; he may succeed as to part of the land and fail as to the remainder. *Wellendorf v. Tesch*, 77 Minn. 512 (80 N. W. Rep. 629). Minn. Gen. Stat. 1894, § 5817, authorizing the bringing of an action to determine an adverse claim to land, authorizes such an action to determine one particular adverse claim, which may be specified or described in the complaint, and, if an equity action to remove a cloud from the title cannot be sustained as such, it still may be sustained as an action to determine adverse claims under the statute, if the complaint is sufficient for that purpose; overruling former decisions holding to the contrary. Where, in such an action, the defendant in his answer sets up his own claims to the land, and asks to have plaintiff's claims adjudged void, the question

of whether the plaintiff is in possession, or the land is vacant and unoccupied, is thereby rendered immaterial. *Palmer v. Yorks*, 77 Minn. 20 (79 N. W. Rep. 587). For construction of particular findings in an action to quiet title, see *Gehr v. Knight*, 77 Minn. 88 (79 N. W. Rep. 652). A plaintiff who has rested his case after proof of a conveyance to him under an execution sale of the premises, may be permitted to show that he was a good faith purchaser, where the defendant sets up title under a prior unrecorded deed. *Douglass v. Willard*, 129 Cal. 38 (61 Pac. Rep. 572). Where the only issue in an action to quiet title was the validity of a deed under which defendant asserted title, a decree in favor of the plaintiff will not preclude the defendant from afterward asserting an equitable lien for money paid by him in discharging a valid mortgage on the property. *Upton v. Betts*, 59 Neb. 724 (82 N. W. Rep. 19). A general description in a complaint to quiet title which describes the land claimed by a defendant as a part of the S. W. fractional  $\frac{1}{4}$  of section 5, containing 54 acres, is cured by an answer of such defendant describing the land as "that part of the S. W.  $\frac{1}{4}$  of section 5, west of White River, containing 54 acres." *Hess v. Adler*, 67 Ark. 444 (55 S. W. Rep. 843). In an action by the owner of the government title of wild land to restrain the defendant from removing the timber thereon, and to remove a cloud from the title growing out of a tax deed held by the defendant, the validity of the decree on which the deed rests may be raised. *Case v. Skinner*, 121 Mich. 206 (79 N. W. Rep. 1093). In an action by equitable owners of land in possession thereof to establish their title and cancel as a cloud thereon an invalid deed of the land to third persons by the holder of the legal title, it is not proper to enjoin the execution of conveyances by the grantee of such deed, as his grantees during the pendency of the action will be bound by the result thereof. *Puryear v. Sanford*, 124 N. C. 276 (32 S. E. Rep. 685). Ia. Laws 25th Gen. Assem., ch. 103 construed and applied—allowance of attorney's fee to plaintiff. *Lawless v. Stamp*, 108 Ia. 601 (79 N. W. Rep. 365). N. Dak. Rev. Codes, § 5904; Laws 1897, ch. 126, § 79, construed and applied—adjudication of liens derived through tax sales. *McHenry v. Kidder Co.*, 8 N. Dak. 413 (79 N. W. Rep. 875). Utah

Rev. Stat. 1898, § 3511 construed and applied—practice where equitable title is involved. *Park v. Wilkinson*, 21 Utah, 279 (60 Pac. Rep. 945). For case determining particular questions as to the admissibility of evidence, see *Roush v. Roush*, 154 Ind. 562 (55 N. E. Rep. 1017).

**Sec. 652. Miscellaneous notes.** A replevin action is not the proper means of litigating and determining the title to real property as between conflicting claimants *Rees v. Higgins*, 9 Kan. App. 832 (61 Pac. Rep. 500). N. J. Laws 1896, p. 243, as amended by Laws 1897, p. 211, which provides, in substance, that when any person claims to be entitled to a vested remainder in lands or personalty, and his title is denied or disputed, he may maintain a suit in chancery to settle the title and to clear up all disputes and doubts concerning the same, is constitutional. *Haley v. Goodheart*, 58 N. J. Eq. 368 (44 Atl. Rep. 193).

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## REAL ACTIONS

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### EPITOME OF CASES.

**Sec. 653. Jurisdiction—State and federal courts.** The commencement of a suit in the federal court to enforce a mechanic's lien on property does not conflict with the jurisdiction of a state court of a subsequent action to foreclose a mortgage. *National Foundry & Pipe Works Co. v. Oconto City Water Supply Co.*, 105 Wis. 48 (81 N. W. Rep. 125). During the pendency of bankruptcy proceedings in a federal court on application to confirm an assignee's sale thereunder, an action to quiet title cannot be maintained in a state court against the assignee's grantee by a grantee of the property from the bankrupt. *Potter v. Martin*, 122 Mich. 542 (81 N. W. Rep. 424); *Lyon v. Clark*, 124 Mich. 100 (82 N. W. Rep. 1058); *Lyon v. Clark*, 124 Mich. 100 (83 N. W. Rep. 604); *Bardes v. Bank*, U. S. (20 Sup. Ct. Rep. 1000).

**Sec. 654. Jurisdiction depending on action involving title.** Cal. Code Civ. Proc., § 838 construed and applied—jurisdiction of justice court—title to realty involved. *Boyd v. Southern Cal. R. Co.*, 126 Cal. 571 (58 Pac. Rep. 1046). An action to establish a lien on real estate does not involve a freehold, *Kyle v. Shore*, 27 Colo. 300 (60 Pac. Rep. 568); nor does an action to declare an absolute deed a mortgage and establish the right to redeem therefrom, *Schoendubee v. International Bldg. L. & Inv. Union*, 183 Ill. 139 (55 N. E. Rep. 710); *Adamski v. Wieczorek*, 181 Ill. 361 (54 N. E. Rep. 1034); and in the last case this is held to be true although the court as incident to such relief decrees the setting aside of a conveyance by the defendant. The fact that a defense to an action for injury to real property is based upon a claim of ownership does not involve a freehold. *Cobine v. McKittrick*, 186 Ill. 324 (57 N. E. Rep. 880). If the subject of partition is a freehold estate, a freehold is involved in the action for partition. *Schwartz v. Ritter*, 186 Ill. 209 (57 N. E. Rep. 887). A statute (Ia. Code, § 4211) giving justices of the peace jurisdiction of actions for the forcible entry and detention of real estate in cases where the tenant holds after the termination, or contrary to the terms of the lease, does not contravene a constitutional provision, (Ia. Const., art. 11, § 1) excepting from the jurisdiction of justices cases where the question of title to real estate may arise. *Herkimer v. Keeler*, 109 Ia. 680 (81 N. W. Rep. 178). Citing, *Beck v. Glenn*, 69 Ala. 121; *Dibell v. People*, 22 Mich. 371; *Hannigan v. Mossler*, 44 Ill. App. 117; *Hart v. Moon*, 6 Cal. 161; *Weston v. Haley*, 27 Vt. 283. An action for forcible entry and detainer does not involve the title to the real estate so as to give a court jurisdiction of it on account of that fact. *McClain v. Jones*, 60 Kan. 639 (57 Pac. Rep. 500). The fact that a defendant sets up a claim of title to lands as a defense to an action against him for damages for their alleged wrongful appropriation, does not give the supreme court jurisdiction of an appeal in such an action, under Mo. Const., art. 6, § 12, vesting such court with appellate jurisdiction of suits "involving title to real estate." *Edwards v. Missouri, K. & E. Ry. Co.*, 148 Mo. 513 (50 S. W. Rep. 89). Title is not involved so as to confer jurisdiction under this provision, in an action to fore-

close a mechanic's lien, *Force v. Van Patton*, 149 Mo. 446 (50 S. W. Rep. 906); nor in an action for trespass, the judgment in which can be satisfied by the payment of money, *Cox v. Barker*, 150 Mo. 424 (51 S. W. Rep. 1051); nor in an action to cancel a deed of trust on the ground that the debt it was given to secure had been paid. *Bonner v. Lisenby*, 157 Mo. 165 (57 S. W. Rep. 735). But in order for this statute to apply, it is absolutely necessary that some sort of a contest arise over the title, as by an action of ejectment, a bill to remove a cloud on title, a bill to quiet title or to set aside a conveyance. *Force v. Van Patton*, 149 Mo. 446 (50 S. W. Rep. 906). It is not sufficient that title be collaterally affected by the judgment which may be rendered. *Gay v. Missouri Guar. Sav. & Bldg. Ass'n*, 149 Mo. 606 (51 S. W. Rep. 403). It is error for a justice to dismiss a summary proceeding in ejectment on the ground of the want of jurisdiction on account of title being involved in the action, simply upon the defendant's claim of an equitable title to sustain which there is no evidence. *McDonald v. Ingram*, 124 N. C. 272 (32 S. E. Rep. 677).

**Sec. 655. Jurisdiction—Particular courts—Miscellaneous notes.** In Indiana a justice of the peace has no jurisdiction in an action of ejectment. *Bernhamer v. Hoffman*, 23 Ind. App. 34 (54 N. E. Rep. 132). Under 3 Mich. Comp. Laws 1897, § 10555, it is held that a circuit court has jurisdiction of an action attaching real estate brought by a nonresident creditor against a nonresident debtor who has been served personally. *State Bank of Eldorado v. Maxson*, 123 Mich. 250 (82 N. W. Rep. 31). Construing Mo. Rev. Stat. 1889, § 7133, providing that in case a majority of persons entitled to land do not reside in any county in which any of the premises is situate, "or all of them are nonresidents of the state, the proceedings for partition shall be had in the circuit court of that county in which an equal or greater part of such premises may be," it is held that the statute is mandatory; and that the "equal or greater part of such premises" referred to in the statute means the area and not the value. *Johnson v. Detrick*, 152 Mo. 243 (53 S. W. Rep. 891). Ohio Rev. Stat., § 5031 construed and applied—jurisdiction of action for damages

or to abate a nuisance. *City of Fostoria v. Fox*, 60 O. St. 340 (54 N. E. Rep. 370). Hill's Ann. Or. Laws, § 2175 construed and applied—jurisdiction of justice court of action to recover possession of mining claim. *Pierce v. Rock Creek Gold-Min. Co.*, 37 Or. 342 (61 Pac. Rep. 348). Pa. Laws 1899, p. 449, § 4 construed and applied—fixing jurisdiction of appeal in ejectment by value of premises—certificate of judge. *Matthews v. Rising*, 194 Pa. St. 217 (44 Atl. Rep. 1067). An action to recover damages for the burning of grass growing on land is not an action for the recovery of damages to land, within the meaning of Tex. Rev. Stat., § 1194, subd. 14, requiring such actions to be brought in the county in which the land lies. *Knight v. Houston & T. C. R. R. Co.*, 93 Tex. 417 (55 S. W. Rep. 558). The right to object to the jurisdiction of the court of a suit to remove a cloud on a title, on account of the plaintiff not being in possession of the land, is waived where the defendant fails to raise the question of jurisdiction in the trial court and himself asks for relief against the plaintiff. *State v. Blize*, 37 Or. 404 (61 Pac. Rep. 735).

**Sec. 656. Jurisdiction over lands in another county or state.** An action against purchasers at an administrator's sale of a large quantity of lands as one lot and for a lump sum, some of which they had sold, to set aside the sale as void and asking for a reconveyance of the lands still held by them and an accounting of the proceeds of those which they had sold, may be brought in the county where the defendants reside, although none of the lands are situated in that county. *Smith v. Barr*, 76 Minn. 513 (79 N. W. Rep. 507). Under Cal. Const., art. 6, § 5, providing "that all actions \* \* \* quieting title to or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate \* \* \* affected by said action \* \* \* is situated," it is held that an action to declare a mortgage executed by a trustee on lands a prior lien thereon must be brought in the county where they are situated. *Staacke v. Bell*, 125 Cal. 309 (57 Pac. Rep. 1012).

A decree of a court of equity which has jurisdiction of the parties is binding on them, and, if such decree affects the title to real property in another state, such decree will be given force in that state. *Idaho Gold Min. Co. v. Win-*



chell, Ida. (59 Pac. Rep. 533). A conveyance by a committee, of the land of a lunatic, is not valid, when authorized only by judgment of a court of another state in which the lunatic and the committee reside. Hotchkiss v. Middlekauf, 96 Va. 649 (32 S. E. Rep. 36; 43 L. R. A. 806). While the heirs of an intestate hold his land subject to the unsatisfied claims of his creditors until the same are paid or barred by lapse of time or the failure on the part of the creditors to take the proper steps, they do not hold them in trust for such creditors so as to give a court of equity jurisdiction to compel them to convey land situated in a foreign state to a commissioner appointed by such court to have the land sold to pay debts, although the intestate's estate is insolvent; but the courts of the state where the land is located have jurisdiction to afford the creditors their proper relief. Robinson v. Johnson, Tenn. (52 S. W. Rep. 704).

**Sec. 657. Jurisdiction of courts of one state to determine validity of conveyance of lands in another state.** Judgments of a court of one state cannot determine the validity of a mortgage on land in another state, nor transfer the title to land in that state, and it can make no difference that one of the parties to such judgment is a corporation formed in the former state, and doing business in the latter state. Union Nat. Bank v. State Nat. Bank, 155 Mo. 95 (55 S. W. Rep. 989; 78 Am. St. Rep. 560). The court say: "If the matter in controversy is land, or other immovable property, the judgment pronounced in the *forum rei sitae* is held to be of universal obligation as to all matters of right and title which it professes to decide in relation thereto. \* \* \* On the other hand, a judgment in any foreign country, touching such immovables, will be held of no obligation.' Story, *Confl. Laws* (Redfield's Ed.), § 591. 'It has been declared to be the well-settled rule in America that any title or interest in land or other immovables can only be acquired or lost agreeably to the law of the place where the same is situated.' 3 Am. & Eng. Enc. Law, p. 565, note 4, and cases cited. It may be conceded that a court of equity has power to decree the performance of a contract relating to land beyond its jurisdiction, where it has jurisdiction over the parties; but no such decree can

affect the land, and can only be enforced by compelling the party who has contracted to do so to execute a conveyance in accordance with the terms of the contract. In such circumstances it is the conveyance, and not the decree of the court, that affects the land. *Davis v. Headley*, 22 N. J. Eq. 115. So it has been held that a decree of a court in one state cannot determine the validity of a mortgage on property in another state, or transfer the title to land in such state. *Pittsburg & S. L. R. Co.'s Appeal*, Pa. St. (4 Atl. Rep. 385). This is upon the ground that a state court has no extraterritorial jurisdiction, and is without authority to transfer title to land beyond its limits. In *Osburn v. McCartney*, 121 Ill. 408 (12 N. E. Rep. 72), lands in Pennsylvania and Illinois were devised, and the courts of the former state had construed the will in a suit for the partition of the lands in that state, and it was held that the judgment in that suit did not operate as an estoppel in a suit in the Illinois courts for the portion of lands lying in that state, as the courts of the latter state were not bound by the construction of the will placed upon it by the courts of Pennsylvania, although the testator was a resident of that state."

**Sec. 658. Jurisdiction of courts of equity.** A court of equity is the proper forum in which to obtain a division of crops raised by partners or joint owners. *Neal v. Suber*, 56 S. C. 298 (33 S. E. Rep. 463). When legal process has been fraudulently abused, and a title to property thereby has been attained, which a court of law cannot restore, a court of equity will intervene and afford such relief as may be necessary to undo the wrong and secure a legitimate use of the process. *Kirkhuff v. Kerr*, 57 N. J. Eq. 623 (42 Atl. Rep. 734). A court of equity has no jurisdiction to settle title to real estate between adverse claimants unless the plaintiff has some equity against the party claiming adversely to him, *Hitchcox v. Morrison*, 47 W. Va. 206 (34 S. E. Rep. 993); and equity will not take jurisdiction of an action to construe a deed where only legal titles are involved, *Seeley v. Baldwin*, 185 Ill. 211 (56 N. E. Rep. 1075). In New Jersey it is held that a court of equity has no jurisdiction to decree that a will gives a complainant the legal estate in fee, as against infant defendants who

ask merely that their interests be protected. *Fahy v. Fahy*, 58 N. J. Eq. 210 (42 Atl. Rep. 726). A court of equity cannot entertain jurisdiction of a bill to enjoin a railroad company in possession of land from completing the construction of a railroad thereon, where the issue turns on who owns the land, for the reason that such a court, in the absence of fraud, has no jurisdiction to deprive a party of his legal title to land by decree. *North Shore R. Co. v. Pennsylvania Co.*, 193 Pa. St. 641 (44 Atl. Rep. 1083). Where a father, holding purchase money mortgages given to him by his son on lands to secure debts incurred for the purchase price thereof, was induced to accept a subsequent mortgage executed by the son and his wife in lieu of the original mortgages which he released, equity will restore such original mortgages at the suit of the father's administrator, upon discovery that the last mortgage was a forgery as to the wife, and such action may be maintained after its foreclosure. *Linn v. Linn*, 122 Mich. 130 (80 N. W. Rep. 1000).

**Sec. 659. Former adjudication—General principles.**

A judicial decree, no matter how erroneous, cannot be attacked collaterally where the court had jurisdiction of the subject matter and the parties. *Figge v. Rowlen*, 185 Ill. 234 (57 N. E. Rep. 195). The effect of a former adjudication extends to all the issues which might have been raised and litigated in the case. *Donnell v. Wright*, 147 Mo. 639 (49 S. W. Rep. 874). A judgment rendered against one made a party to a proceeding on account of his being an heir to some one is conclusive upon his rights as an individual so far as they are involved in the issues necessarily determined in the case. *Armstrong v. Hufty*, 156 Ind. 606 (55 N. E. Rep. 443); but it is held that one seeking to recover land as the heir of his mother is not bound by a judgment against him in a suit in which he appeared as the heir of his father, *Melton v. Pace*, 103 Tenn. 484 (53 S. W. Rep. 939). In order for one seeking to maintain an action to determine the title to land to be barred by a former decree to which he was a party, the record of such decree must show that the right or title of such party to the land in controversy in the second action necessarily was or in fact tried, determined or involved in the previous

action. *McCombs v. Wall*, 66 Ark. 336 (50 S. W. Rep. 876). A decree adjudging that a purchaser at a judicial sale acquired no title, does not affect his rights under deeds from the prior owner acquired by him subsequent to the decree. *Gore v. Gore*, 101 Tenn. 620 (49 S. W. Rep. 737).

**Sec. 660. Former adjudication—Who bound by.** A decree of divorce is not admissible in evidence against a stranger to it to show that property is a homestead. *Roulston v. Hall*, 66 Ark. 305 (50 S. W. Rep. 690; 74 Am. St. Rep. 97). A judgment in a divorce suit between a husband and his second wife awarding her alimony in land to which he held the legal title, but which in fact was subject to resulting trust in favor of the children of the first wife on account, having been purchased with her separate estate, is not conclusive of his title as against such children in a suit by them to establish the trust. *Arnold v. Harris*, Tenn. (52 S. W. Rep. 715). A decree against the heirs of an intestate in an action brought by them to rescind his contract, is not binding on his administrator who was not a party to the suit and who had no knowledge of it. *Forbes v. Douglass*, 175 Mass. 191 (55 N. E. Rep. 847). A judgment fixing the liability of a homestead for a debt rendered against the holder thereof is binding upon the beneficiaries of the homestead although they were not parties to the action. *Wegman Piano Co. v. Irvine*, 107 Ga. 65 (32 S. E. Rep. 898; 73 Am. St. Rep. 109). Such a judgment is conclusive against the homestead claimant in favor of a purchaser at a sale thereunder, though after the sale the former may have established lost papers showing his prior right to a homestead. *Cosnahan v. Johnston*, 108 Ga. 235 (33 S. E. Rep. 847; 75 Am. St. Rep. 36). A judgment in favor of the holder of a tax title rendered in an action brought by him against a mortgagor, and to which the mortgagee was not made a party, is not conclusive upon the latter, although he participated in the defense as the mortgagor's agent, by employing and paying counsel and conducting it. *Williams v. Cooper*, 124 Cal. 666 (57 Pac. Rep. 577). Where, in an action by a wife to enjoin her husband's creditor from selling on execution land conveyed to her by her husband, the latter has full knowledge of the proceedings and participates therein as a witness

and otherwise he will be bound by the judgment rendered although not a nominal party to the action. *Shoemaker v. Finlayson*, 22 Wash. 12 (60 Pac. Rep. 50). Applying Ala. Code 1896, § 296, providing that only creditors or other persons interested in the estate of a decedent may make an issue as to the correctness of the report of insolvency, it is held that a decree of the probate court showing the insolvency of the decedent's estate is not admissible in evidence in an action by a creditor against a third person to subject land conveyed to the latter to the payment of a debt due to plaintiff from the decedent. *Bush v. Coleman*, 121 Ala. 548 (25 So. Rep. 569).

**Sec. 661. Former adjudication—Conclusiveness of judgment rendered against a party after his death.** Title acquired by purchase at a sale under a judgment in attachment proceedings cannot be defeated on a collateral attack by proof of the death of the attachment defendant before rendition of the judgment, where it appears that the action was brought and the writ levied prior to his death. *Shea v. Shea*, 154 Mo. 599 (55 S. W. Rep. 869; 77 Am. St. Rep. 779). The court say: "The great weight of authority in this country is that, where a court has acquired jurisdiction of the subject-matter and of the person, the death of the defendant before the judgment is rendered will not render the judgment void for that reason. *Yaple v. Titus*, 41 Pa. St. 195 (80 Am. Dec. 604); *Warder v. Tainter*, 4 Watts, 279; *Collins v. Mitchell*, 5 Fla. 364; *Freem. Judgm.* (3d Ed.) § 140." But in Kansas it is held that a judgment foreclosing a mortgage upon real estate rendered against a deceased defendant, who had been theretofore duly served with process, is void, although the fact of death does not appear of record; and it may be collaterally impeached because thereof by the heirs of the deceased, if not made parties to the foreclosure proceedings, in an action brought by them for the recovery of the land sold and conveyed in satisfaction of the judgment. *Kager v. Vickery*, 61 Kan. 342 (59 Pac. Rep. 628; 78 Am. St. Rep. 318; 49 L. R. A. 153, and note containing an exhaustive collation of authorities on effect of judgment entered against deceased person).

**Sec. 662. Former adjudication—Particular cases.** A defendant in foreclosure proceedings against whom decree is rendered, by a subsequent proceeding to set aside and enjoin a sale thereunder, cannot litigate a question which could have been litigated in the foreclosure suit. *Myers v. Jones*, 61 Kan. 191 (59 Pac. Rep. 275). The determination of the title to real estate under the will of a testator made in a decree of distribution is conclusive of such title between the parties in interest or those claiming under them. *McKenzie v. Budd*, 125 Cal. 600 (58 Pac. Rep. 199). Applying Cal. Code Civ. Proc., § 1908, providing that a former judgment is conclusive between the parties only "when the same thing under the same title" is litigated, it is held that a judgment against the plaintiff in an action by him to quiet title does not bar him from maintaining a subsequent action to declare the defendant a constructive trustee for him of the same land. *South San Bernardino L. & Inv. Co. v. San Bernardino Nat. Bank*, 127 Cal. 245 (59 Pac. Rep. 699). A judgment against the plaintiff in an action involving land to which he claimed the legal title, on the ground that parol evidence of an oral agreement concerning an easement could not be established against a deed, does not bar a subsequent suit in equity by him to reform the deed, on the ground that the defendant took the land with notice of the agreement. *Botsford v. Wallace*, 72 Conn. 195 (44 Atl. Rep. 10). A judgment in an action in ejectment in which the plaintiff claimed title and right to possession by virtue of a final pre-emption receipt which gave him a right to a patent to lands which had been surveyed by the government, is conclusive between the same parties in a subsequent action involving the same issues brought after the issuance of a patent to the plaintiff of the lands described in the receipt. *Graves v. Hebbbron*, 125 Cal. 400 (58 Pac. Rep. 12). A judgment against a plaintiff in a suit of trespass to try title who claims as a purchaser under a sale made by a trustee under a deed of trust, on the ground of the sale being a nullity, does not bar a subsequent action to foreclose the trust deed and recover from an assignee of the mortgagor who had assumed the payment of the debt. *American Freehold Land Mortg. Co. v. Macdonell*, 93 Tex. 398 (55 S. W. Rep. 737). Where defendant, being the owner of a certain tract of

land, a parcel of which was in the possession of a third party, was called in, as warrantor, to defend an action to try title to such parcel, he was such a party in interest in that action as to render the questions therein decided res adjudicata in an action by the same plaintiff to try title to the entire tract. *Hanrick v. Gurley*, 93 Tex. 458 (56 S. W. Rep. 330). A judgment for the reconveyance of land rendered in an action to compel reconveyance of land conveyed to one in trust to reconvey when he had sold enough timber off the land to satisfy his claim against the grantor, does not bar the plaintiff from maintaining a subsequent action for the value of surplus timber sold, where such claim was not adjudicated in the other action. *Tyler v. Capehart*, 125 N. C. 64 (34 S. E. Rep. 108). The county court being vested by Mo. Const. 1865, art. 6, § 1, subd. 23 with exclusive original jurisdiction in all matters relating to the appointment of guardians for insane persons, etc., a judgment by such court rendered under Mo. Rev. Stat. 1889, §§ 5549, 5550, declaring an insane ward restored to his right mind and discharging him from custody, cannot be attacked collaterally. *McKenzie v. Donnell*, 151 Mo. 431 (52 S. W. Rep. 214). An action by a purchaser to recover the price paid by him because of an ouster by his vendor is not barred by the judgment of dismissal in a prior action for the same purpose, rendered on the ground that the plaintiff had not rescinded. *Taylor v. Neys*, 11 S. Dak. 605 (79 N. W. Rep. 998). A vendee in a contract for the conveyance of land who, upon the decease of her vendor, has a right to ask for a decree for specific performance of the contract, or to sue for damages accruing from the breach thereof, or to treat the contract as abandoned and sue for the value of her services which form the consideration for the promised conveyance, is not concluded by a decree rendered against her on her disclaimer in an action to quiet title brought by the heirs of her vendor after his death, from subsequently enforcing her claim for damages against his estate, where the statute (Ind. Rev. Stat. 1894, § 2465; Rev. Stat. 1901, § 2465), regulating the filing of claims against decedent's estates, prescribes an exclusive method for presenting such claims and prevented her from setting up her claim for damages

in the action to quiet title. *Doddridge's Estate v. Doddridge*, 24 Ind. App. 60 (56 N. E. Rep. 112).

**Sec. 663. Tender.** One making a tender, and then using the money, and afterward failing to pay the money into court, with a pleading relying upon such tender, loses its benefit, and will not be released from interest by it. *Shank v. Groff*, 45 W. Va. 534 (32 S. E. Rep. 248). Citing, *Thompson v. Lyon*, 40 W. Va. 97 (20 S. E. Rep. 812); *McCalley v. Otey*, 99 Ala. 584 (12 So. Rep. 407; 42 Am. St. Rep. 90). A vendor is excused from tendering a deed according to the terms of his contract where his vendee has refused to perform his part of the contract. *Lee v. Stone*, 21 R. I. 123 (42 Atl. Rep. 717).

**Sec. 664. Injunctions—General principles—Practice.** A preliminary injunction against a threatened injury to property will not be granted to one whose title to the property appears to be defective. *Amos v. Norcross*, 58 N. J. Eq. 256 (43 Atl. Rep. 195). Where the issues in a proceeding to enjoin the unlawful removal of oil or gas from land involve the determination of the boundary line between two adjoining owners, and incidentally thereto the ownership of the well, all the owners of the fee of both tracts are necessary parties to the suit. *Moore v. Jennings*, 47 W. Va. 181 (34 S. E. Rep. 793), citing numerous authorities. Where, pending an action by a land owner to restrain the operation of a railroad over his premises, he conveys the premises to another and his grantee conveys to a third party, the court properly may have such grantees made parties plaintiff on their petition, although both deeds contain a reservation of damages; and the defendant will be permitted to proceed as if a supplemental complaint had been filed. N. Y. Code Civ. Proc., §§ 723, 760 construed and applied. *Mooney v. New York El. R. Co.*, 163 N. Y. 242 (57 N. E. Rep. 496). Upon a motion to dissolve a temporary injunction great latitude of discretion is left with the chancellor. It is proper for him to consider and weigh the relative degree of injury or benefit to the complainant and respondent which may follow from the continuance of the injunction on the one hand or its dissolution on the other, and, if less damage and injustice would



probably result from a continuance of the injunction than from its dissolution, a wise exercise of the discretion would be to continue the injunction to await the final hearing. *Mabel Min. Co. v. Pearson Coal & Iron Co.*, 121 Ala. 567 (25 So. Rep. 754). On this subject, see *Alcorn v. Alcorn*, 76 Miss. 907 (25 So. Rep. 877); *Mobile & M. Ry. Co. v. Alabama Midland Ry. Co.*, 123 Ala. 145 (26 So. Rep. 324).

**Sec. 665. Injunctions—Causes sufficient for granting.**

The owner of a mine may have an injunction against the unlawful extraction of ores therefrom by a third person. *Muldrick v. Brown*, 37 Or. 185 (61 Pac. Rep. 428). The unlawful extraction of oil or gas from land may be enjoined, *Moore v. Jennings*, 47 W. Va. 181 (34 S. E. Rep. 793); and a temporary injunction against the removal of ore from the mining land of the complainant will not be dissolved because of defendant's solvency, *Mabel Min. Co. v. Pearson Coal & Iron Co.*, 121 Ala. 567 (25 So. Rep. 754). A tenant in common of timber lands may be enjoined by his cotenant from cutting and removing timber therefrom. *State v. Judge of Fourth Jud. Dist.*, 52 La. Ann. 103 (26 So. Rep. 769). A land owner is entitled to have an intermeddler restrained from erecting a permanent obstruction on his property, regardless of the land owner's use or intended use of the property. *Peoria & Ry. Co. v. Attica, C. & S. Ry. Co.*, 154 Ind. 218 (56 N. E. Rep. 210). Injunction is the appropriate remedy to prevent an execution sale of land for the satisfaction of a judgment which is neither a lien on the property, nor a personal charge against the owner, *Predohl v. O'Sullivan*, 59 Neb. 311 (80 N. W. Rep. 903); *Bean v. Everett*, Ky. (56 S. W. 403; 21 Ky. Law Rep. 1790); and a judgment debtor may enjoin an execution sale of his land at the instance of an assignee of the judgment who has contracted to save such debtor harmless from the debt represented by it, *Plummer v. Talbott*, Ky. (50 S. W. Rep. 1097; 21 Ky. Law Rep. 30). Equity by injunction may interfere to prevent the obstruction of a private way where its existence clearly is shown, before the establishment of such way by an action at law. *Manbeck v. Jones*, 190 Pa. St. 171 (42 Atl. Rep. 536). Where it is necessary to protect their right of ingress and egress, abutting owners can by injunction prohibit closing or obstructing a street. *Raht v. Southern Ry. Co.*, Tenn. (50 S. W. Rep. 72). The

owners of property injuriously affected thereby may enjoin the wrongful closing up and appropriation of a public street by a railroad company. *Louisville & N. R. Co. v. Sonne*, Ky. (53 S. W. Rep. 274; 21 Ky. Law Rep. 848). Citizens and taxpayers who will be deprived of free access to the public landing and river, and of the free enjoyment of light and air from the landing, by the unlawful erection of a building thereon by a lessee, can maintain a suit for an injunction against the structure. *Reighard v. Flinn*, 189 Pa. St. 355 (42 Atl. Rep. 23; 43 L. R. A. 502). A city may be enjoined from taking possession of and obstructing for highway purposes, without offer of compensation, property which it had leased to another as a right of way. *Lowery v. City of Pekin*, 186 Ill. 387 (57 N. E. Rep. 1062; 51 L. R. A. 301). One having an easement to draw a certain amount of water from a reservoir may enjoin the owner of the fee from filling up a portion of such reservoir to the injury of the use and enjoyment of his easement. *Koenig v. City of Watertown*, 104 Wis. 409 (80 N. W. Rep. 728). The threatened use of a stream by a city for the discharge of sewage into it, which necessarily will result in producing a nuisance, may be enjoined without awaiting judicial establishment in an action at law of the prospective nuisance. *Sayre v. Mayor of City of Newark*, 58 N. J. Eq. 136 (42 Atl. Rep. 1068). Injunction will lie against a corporation empowered to exercise the right of eminent domain, when it is proceeding to take or injure land for its use without consent of the owner, and without legal proceedings to subject it to such use. *Mobile & M. Ry. Co. v. Alabama Midland Ry. Co.*, 123 Ala. 145 (26 So. Rep. 324). Though a court of equity will not determine a dispute concerning a purely legal title to lands, where no equitable question is connected therewith, it will restrain wanton injury to structures on the land in dispute, not adequately remediable at law, until the complainant shall by suit at law have his rights adjudicated. *Johnson v. Hughes*, 58 N. J. Eq. 406 (43 Atl. Rep. 901). A board of health of a township empowered by a statute (Ia. Code, §§ 2568, 2570) to establish quarantine against all diseases dangerous to the public and make such provisions as are better calculated to preserve the inhabitants of the township from danger, may enjoin the erection of a pest house within the limits of the township by another municipality on land owned by it, for the purpose of caring for persons afflicted with dangerous diseases, without proof that

such acts would constitute a nuisance. *Warner v. Stebbins*, 111 Ia. 86 (82 N. W. Rep. 457).

**Sec. 666. Injunctions—Causes insufficient for granting.** Injunction will not lie against an unlawful assessment of taxes where the party has an adequate remedy by a petition of abatement of the taxes. *Kelley v. Barton*, 174 Mass. 396 (54 N. E. Rep. 860). In California an injunction will not be granted to prevent a sale of real estate to pay a void street assessment. *Byrne v. Drain*, 127 Cal. 663 (60 Pac. Rep. 433). A diversion of the waters of a stream by a water company in order to furnish the public with water will not be enjoined at the suit of one whose injury is not clearly traceable to such diversion and who has an adequate remedy at law for the damage sustained by him. *Murphy v. Stanford Water, Light & Ice Co.*, Ky. (50 S. W. Rep. 835; 20 Ky. Law Rep. 2000). The removal of a building from a municipality cannot be enjoined on the ground that its taxables thereby are reduced, so as to increase the burden of taxes on the remaining property owners. *Town of St. Lawrence v. Gross*, 12 S. Dak. 350 (81 N. W. Rep. 640; 47 L. R. A. 572; 76 Am. St. Rep. 612). Particular facts held insufficient to authorize an injunction against the use of a mill race. *Bartlett v. Moyers*, 88 Md. 715 (42 Atl. Rep. 204).

**Sec. 667. Injunctions against trespass—Intruding walls.** Except in a case specially provided for by statute, equity will not interfere to restrain a trespass, unless the injury is irreparable in damages, or the trespasser is insolvent, or there exist other circumstances which, in the discretion of the court, render the interposition of this writ necessary and proper. *Waters v. Lewis*, 106 Ga. 758 (32 S. E. Rep. 854); *Putney v. Bright*, 106 Ga. 199 (32 S. E. Rep. 107); *Sharpe v. Loane*, 124 N. C. 1 (32 S. E. Rep. 318); *Puryear v. Sanford*, 124 N. C. 276 (32 S. E. Rep. 685); *Meyers v. Hawkins*, 67 Ark. 413 (56 S. W. Rep. 640). Injunction is the proper remedy for a trespass which is being repeated continually and which the defendant threatens to continue indefinitely. *McClellan v. Taylor*, 54 S. C. 430 (32 S. E. Rep. 527). Where a trespass has been committed, and repetitions thereof are threatened, and the injury which follows such trespass is irreparable in damages, equity will interfere by injunction, although the insolvency of

the debtor is not alleged. *Edwards v. Haeger*, 180 Ill. 99 (54 N. E. Rep. 176). Where strong and aggravating instances of continuing trespass are shown, which necessarily must result in substantial damages to the plaintiff's property, that are in no way offset by benefits, a permanent injunction may be issued, although the amount of the damages is not fixed. *Garvey v. Long Island R. Co.*, 159 N. Y. 323 (54 N. E. Rep. 57; 70 Am. St. Rep. 550). Injunction is the proper remedy against one who, without right, intrudes himself upon the premises of another, assumes control over his business, intercepts moneys due to him, and holds himself out to the public as a partner having the right so to do. *De Groot v. Peters*, 124 Cal. 406 (57 Pac. Rep. 209; 71 Am. St. Rep. 91). A wall intruding upon the land of another, but which does not interfere with his enjoyment to the full extent thereof, is a continuing trespass for which a court of equity will afford him a remedy. *Rahn v. Milwaukee Elec. Ry. & Light Co.*, 103 Wis. 467 (79 N. W. Rep. 747). Citing, *Wheelock v. Noonan*, 108 N. Y. 179 (15 N. E. Rep. 67; 2 Am. St. Rep. 405); *Baron v. Korn*, 127 N. Y. 224 (27 N. E. Rep. 804); *Eno v. Christ*, N. Y. Sup. (54 N. Y. Supp. 400); *Pile v. Pedrick*, 167 Pa. St. 296 (31 Atl. Rep. 646, 647; 46 Am. St. Rep. 677); *Harrington v. McCarty*, 169 Mass. 492 (48 N. E. Rep. 278; 61 Am. St. Rep. 498); *Coatsworth v. Railroad Co.*, 156 N. Y. 451 (51 N. E. Rep. 301).

**Sec. 668. Appointment of receivers—Practice—Statutes construed.** The appointment of a receiver is an exercise of the equitable power of the court and will not be made where the controversy is a legal one or where the party asking it has been derelict in the performance of his duty. *Bennallick v. Richards*, 125 Cal. 427 (58 Pac. Rep. 65). Only an extreme case will authorize the appointment of a receiver to take possession of property without giving notice to parties having control of the property. *Gilreath v. Union Bank & T. Co.*, 121 Ala. 204 (25 So. Rep. 581). It is improper for a court to appoint a receiver in an action for the sale of partnership real estate where there is no averment in the complaint of any facts showing a necessity for such appointment and nothing in the agreement between the parties in which the decree was rendered which can be construed into a consent by them to his appointment. *Jordan v. Jordan*, 121 Ala. 419 (25 So. Rep.

855). A receiver for rents and profits of real estate will not be appointed on motion of appellant pending an appeal in an action involving a question of disputed title. *Corbin v. Thompson*, 141 Ind. 128 (40 N. E. Rep. 533). Creditors attaching land of their debtor during his lifetime, after his death cannot have a receiver appointed to take possession thereof, where the land already is in possession of an administrator under an order of the proper probate court who is proceeding to collect the rents and apply the land to the payment of debts, and who is liable on his bond for any misapplication of any of the rents or proceeds. *St. Louis Nat. Bank v. Field*, 156 Mo. 306 (56 S. W. Rep. 1095). Cal. Civ. Code, § 140 construed and applied—appointment of receiver to enforce payment of alimony. *Huellmantel v. Huellmantel*, 124 Cal. 583 (57 Pac. Rep. 582). W. Va. Code, ch. 133, § 28 construed and applied—showing required to justify appointment of receiver before decree. *Wilson v. Maddox*, 46 W. Va. 641 (33 S. E. Rep. 775). For an exhaustive collation of authorities on “When it is proper to appoint a receiver,” see 72 Am. St. Rep. 29-96.

**Sec. 669. Appeal from order appointing receiver.** An order appointing a receiver in a foreclosure suit is a final order from which an appeal may be taken, under Wyo. Rev. Stat., § 3126, providing that “an order affecting a substantial right made in a special proceeding is a final order;” but the receiver is not a necessary party to the appeal. *Anderson v. Matthews*, 8 Wyo. 307 (57 Pac. Rep. 156). Upon the first point the court say: “The supreme court of Ohio, from which state our code is taken, have held that the appointment of a receiver is a special proceeding, and that such appointment, or the vacation of a receivership, may affect substantial rights, and that such orders are the subject of review on error. *Railroad Co. v. Sloan*, 31 O. St. 6. The same view of the question is taken in *Adair v. Wright*, 16 Ia. 385; *Knight v. Nash*, 22 Minn. 452; *Schultz v. Insurance Co.*, 14 Fla. 73; and other cases in those states. And this court, in *First Nat. Bank of Sundance v. Moorcroft Ranch Co.*, 5 Wyo. 55 (36 Pac. Rep. 821), followed the Ohio rule in holding that an order discharging or sustaining an attachment is a final order, and subject to review before judgment. As is said in *Railroad Co. v. Sloan*, 31 O. St. 6, the principle of the decision applies as well to the vacation of a receivership as to the discharge of an attachment. The

authorities are not uniform, but, under the conditions of legislation in this state, we think this court should follow the Ohio decisions upon the question."

**Sec. 670. Title and rights of receivers—Sale of property held by—Actions against.** A receiver of a lessee takes his property subject to the lessor's lien for rent. *Lane v. Washington Hotel Co.*, 190 Pa. St. 230 (42 Atl. Rep. 697). For exhaustive note on "The relation of receivers to pre-existing liens and the remedies for their enforcement," see 71 Am. St. Rep. 352-384. A receiver appointed in an action of ejectment who is directed by order of the court to collect a certain portion of the crops grown on the land in dispute and superintend the gathering and measuring of the same, has constructive possession of the land. *Delozier v. Bird*, 125 N. C. 493 (34 S. E. Rep. 643). Where, in receivership proceedings, a consent decree is entered directing a public sale of the property after the giving of a specified notice, a private sale of the property subsequently effected by the receivers without a further order of the court will be set aside upon a bona fide offer of a third person to advance the price received. *South Baltimore Brick & Tile Co. v. Kirby*, 89 Md. 52 (42 Atl. Rep. 913). The statutes of the United States (24 U. S. Stat. 554, ch. 374, § 3) expressly authorize the commencement of an action against receivers or managers of any property who have been appointed by any federal court in respect to any of their acts or transactions "in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed." *Stolz v. Milwaukee & L. W. R. Co.*, 104 Wis. 47 (80 N. W. Rep. 68).

**Sec. 671. Parties—Joinder of parties—Amendments—Dismissal.** Several different owners on the banks of a stream, including a city having the right to take water therefrom for its inhabitants, may join in an action to enjoin the pollution of the stream by the discharge of sewage therein by another city through an artificial system of sewage; and the owners of houses connected with such sewers are not necessary parties. *Grey v. Mayor of City of Paterson*, 58 N. J. Eq. 1 (42 Atl. Rep. 749). The execution creditor and debtor are not necessary parties to a mandamus proceeding brought to compel an officer making an execution sale to receive the bid of

the purchaser and execute a conveyance to him. *State v. Scarborough*, 56 S. C. 48 (33 S. E. Rep. 779). A bill to subject to the payment of a judgment the interest of the judgment debtor as a joint tenant in land need not make the other joint owners parties, where their interests are not sought to be sold or otherwise affected. *Burke v. Morris*, 121 Ala. 126 (25 So. Rep. 759). Ky. Civ. Code Prac., § 439 construed and applied—action to enforce judgment—parties. *Ritchey v. Buricke's Adm'rs*, Ky. (54 S. W. Rep. 173; 21 Ky. Law Rep. 1120). Several persons, though claiming under distinct titles, who have a common interest in the prevention of the diversion or pollution of water, may join in a bill to enjoin it. *Grey v. Mayor of City of Paterson*, 58 N. J. Eq. 1 (42 Atl. Rep. 749); *Lonsdale Co. v. Cook*, 21 R. I. 498 (44 Atl. Rep. 929). Citing, *Churchill v. Lauer*, 84 Cal. 233 (24 Pac. Rep. 107); *Ballou v. Inhabitants of Hopkinton*, 4 Gray, 328; *Proprietors of Mills on Monatiquot River v. Braintree Water-Supply Co.*, 149 Mass. 478 (21 N. E. Rep. 761; 4 L. R. A. 272); *Sullivan v. Phillips*, 110 Ind. 320 (11 N. E. Rep. 300); *Story*, Eq. Pl. § 285; 10 Enc. Pl. & Prac. 906. Where defendants who are served by fictitious names appear and answer in their real names, the complaint should be so amended and judgment rendered accordingly. *Alameda County v. Crocker*, 125 Cal. 101 (57 Pac. Rep. 766). It is error to permit to the filing in an action to enforce a seed lien of an amended complaint to recover damages for the wrongful conversion of the grain upon which the lien is claimed. *Mares v. Wormington*, 8 N. Dak. 329 (79 N. W. Rep. 441). Mont. Code Civ. Proc., § 1004, subd. 1 construed and applied—dismissal of action by plaintiff. *State v. Lindsay*, 24 Mont. 352 (61 Pac. Rep. 883).

**Sec. 672. Counterclaims and crossbills.** Where a cause in which a plaintiff was given a judgment establishing a resulting trust in land in his favor was remanded on appeal with instructions to give defendants an accounting for taxes paid, the plaintiff cannot interpose a counter claim for such accounting for items not included in his complaint. *Adams v. Warren*, 27 Colo. 293 (61 Pac. Rep. 609). In an action by a landowner against a city to enjoin it from interfering with a drain pipe laid by the plaintiff in a street without authority, a cross bill by the defendant predicated upon an alleged public nuisance created and maintained by the plaintiff

upon his said premises for which the drain pipe furnishes a means of drainage, cannot be maintained. *Mathiason v. City of St. Louis*, 156 Mo. 196 (56 S. W. Rep. 890). The court say: "While the rule in equity proceeding permits the filing by one or more defendants of a cross bill against the plaintiff in the same suit or against other defendants in the same suit, it is 'an auxiliary bill simply,' and must be with respect to and germane to the same matters which form the basis of the original bill. *Cross v. De Valle*, 1 Wall. 14 (17 L. Ed. 515); *Ayres v. Carver*, 17 How. 591 (15 L. Ed. 179); *Kemp v. Mitchell*, 36 Ind. 249; *Story, Eq. Pl.* (10th Ed.) § 389; *Kidder v. Barr*, 35 N. H. 251; *Boland v. Ross*, 120 Mo. 208 (25 S. W. 524)."

**Sec. 673. Conclusiveness of answer under oath to bill of equity.** A complainant in a bill of equity who requires a defendant to answer under oath is bound by an answer so made unless overcome by the testimony of two witnesses or by one witness and corroborating circumstances. *Brown v. Daniels*, Tenn. (51 S. W. Rep. 991); *Day v. Jones*, 40 Fla. 443 (25 So. Rep. 275). Citing, *Walter v. McNabb*, 1 Heisk. 703; *Culbertson v. Luckey*, 13 Ia. 12; *Wright v. Wheeler*, 14 Ia. 8; *Allen v. Mower*, 17 Vt. 61; *Feigley v. Feigley*, 7 Md. 537 (61 Am. Dec. 375); *Hartshorn v. Eames*, 31 Me. 93; *Parkman v. Welch*, 19 Pick. 231; *Parkhurst v. McGraw*, 24 Miss. 134; *Fulton v. Woodman*, 54 Miss. 158; *Pattison v. Bragg*, 95 Ala. 55 (10 So. Rep. 257); *Bank v. Steele*, 98 Ala. 85 (12 So. Rep. 783); *Gray v. Faris*, 7 Yerg. 154; *Kittering v. Parker*, 8 Ind. 44; *Blow v. Gage*, 44 Ill. 208; *Myers v. Kinzie*, 26 Ill. 36; *Clark v. Bailey*, 2 Strob. Eq. 143.

**Sec. 674. New trial of right.** Ind. Rev. Stat. 1894, § 1076 (Rev. Stat. 1901, § 1076), providing for a new trial as of right in actions for possession or to quiet title, does not apply to actions to set aside fraudulent conveyances. *Searles v. Little*, 153 Ind. 432 (55 N. E. Rep. 93). Where, after the granting of a new trial as a matter of right to a defendant in an action of ejectment, under Kan. Gen. Stat., ch. 96, § 6, the plaintiff dismisses his action without prejudice, he is barred from commencing a new action against the defendant for recovery of the same land. *Deming v. Douglass*, 60 Kan. 738 (57 Pac. Rep. 954). In Minnesota it is held that Gen. Stat. 1894, § 5845, providing for a second trial as a matter of right in actions for



the recovery of real property, is a remedial statute and must be liberally construed; and in determining the right to such second trial the court will look to the substance of the cause of action determined, and not merely to the form or manner in which it is presented. *Gahre v. Berry*, 79 Minn. 20 (81 N. W. Rep. 537). In a second trial upon the same state of facts, in an action in ejectment, taken under this statute, the decision upon the former appeal controls upon the doctrine of stare decisis, and not upon the doctrine of res adjudicata. *Connecticut ut. Life Ins. Co. v. King*, 80 Minn. 76 (82 N. W. Rep. 1103). For further construction of the statute, see *Western Land Ass'n v. Thompson*, 79 Minn. 423 (82 N. W. Rep. 677). The plaintiff in an action in ejectment who is given a judgment for only a part of the land sued for and costs is a party against whom judgment is rendered, and, under Wis. Rev. Stat., § 3092, is entitled to a second trial as of right upon complying with the conditions of the statute. *Rupiper v. Calloway*, 105 Wis. 4 (80 N. W. Rep. 916).

**Sec. 675. Recovery of attorney's fees.** In the absence of a statute, attorney's fees cannot be awarded to the plaintiff as a part of the damages for injury to persons and property. *Bentley v. Fischer Lumber & Mfg. Co.*, 51 La. Ann. 451 (25 So. Rep. 262). It is not proper to award to a city, attorney's fees as damages upon the dissolution of an injunction against it, where its attorney is retained at an annual salary. *Nixon v. City of Biloxi*, 76 Miss. 810 (25 So. Rep. 664). Attorney's fees and expenses incurred by a trustee in proceedings to condemn land forming a part of the trust estate properly are chargeable against the beneficiaries where they received the benefit of the award of damages made in the proceedings, although the trustees previously had denied the trust. *Fuller v. Abbe*, 105 Wis. 235 (81 N. W. Rep. 401). An executor or trustee is entitled to his proper and necessary expenses incurred in the execution of his trust, to be paid out of the estate, fund, or assets in his hands to be administered, and attorney's fees are proper expenses, whenever it is proper to employ one in the management, care or protection of the trust estate. *Burney v. Atkinson*, Tenn. (54 S. W. Rep. 998). Citing, 2 Pom. Eq. Jur. § 1085; *Gisborn v. Insurance Co.*, 142 U. S. 326 (12 Sup. Ct. Rep. 277; 35 L. Ed. 1029); *Hanna v. Spotts' Heirs*, 5 B. Mon. 362 (43 Am. Dec. 132); *Biddle's Appeal*,

83 Pa. St. 340 (24 Am. Rep. 183) ; Vaccaro v. Cicalla, 89 Tenn. 78 (14 S. W. Rep. 43). A probate court has no jurisdiction to allow attorney's fees for services rendered the heirs in a suit to prevent the administrator from selling lands belonging to the estate to pay its debts, as a claim against the estate, where such attorneys were employed by the heirs or "by the court." Paget v. Brogan, 67 Ark. 522 (55 S. W. Rep. 938). The court say: "Probate courts can authorize the employment of counsel by the administrator, in the necessary protection of the estate in his hands, and may allow fees for such services rendered the administrator to protect and preserve the estate, as necessary expenses of administration. But such a thing as allowing or directing fees to be paid out of the estate to attorneys, whether employed by the heirs or 'by the court,' in a suit against the administrator, is without authority to support it. Creditors are beneficiaries as well as heirs. 'No allowance will be made for the fees of counsel in litigation between beneficiaries of the estate, or for services rendered to any individual beneficiary.' 11 Am. & Eng. Enc. Law (2nd Ed.) 1247; In re Marrey's Estate, 65 Cal. 287 (3 Pac. Rep. 896) ; In re Simon's Will, 55 Conn. 239 (11 Atl. Rep. 36) ; Succession of Hughes, 14 La. Ann. 863; In re McGregor's Estate, 131 Pa. St. 359 (18 Atl. Rep. 902) ; 2 Woerner, Adm'r, § 516." Conn. Gen. Stat., § 1124 construed and applied—allowance of expenses and counsel fees as costs in actions for construction of wills. Horton v. Upland, 72 Conn. 29 (43 Atl. Rep. 492). For exhaustive collation of authorities on "Constitutionality of statutes allowing an attorney's fee," see 79 Am. St. Rep. 179-186; also § 517 in this volume.

**Sec. 676. Appeals—Statutes construed.** Where the subject matter is within the jurisdiction of the court, certiorari will not lie to quash a judgment denying the right to condemn property in eminent domain proceedings for errors which may be corrected by appeal or writ of error, although the latter remedies are inadequate because too slow. State v. Shelton, 154 Mo. 670 (55 S. W. Rep. 1008; 50 L. R. A. 798). Cal. Code Civ. Proc., § 957, authorizing an appellate court upon its modification or reversal of a judgment to make restitution of all property "lost" by the erroneous judgment, "so far as such restitution is consistent with the protection of the purchaser of the property at a sale ordered by the judgment does not

authorize the setting aside of a sale of lands made under a judgment directing their sale, upon the mere modification of such judgment by the appellate court reducing the amount thereof without changing that portion which directed the sale of the property. *Barnhart v. Edwards*, 128 Cal. 572 (61 Pac. Rep. 176). Cal. Code Civ. Proc., § 1722, as amended by Laws 1899, p. 146, construed and applied—appeals from orders in probate proceedings. *In re Tuohy's Estate*, 23 Mont. 305 (58 Pac. Rep. 722). Applying Hill's Ann. Or. Laws, § 329, providing that in an action to recover the possession of real property, the judgment therein is conclusive as to the estate in such property, and the right to the possession thereof, so far as the same is thereby determined, upon the party against whom it is given, it is held that where, pending an appeal from a decree in the plaintiff's favor in a suit to quiet title, he obtains a final judgment against defendants in an action for possession, such judgment terminates the controversy. *Moore v. Moores*, 36 Or. 261 (59 Pac. Rep. 327).

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## REAL ESTATE AGENT

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### EPITOME OF CASES.

**Sec. 677. Authority of agent.** The fact that the payee in a mortgage note sent one of the interest coupons to his agents for collection does not give them authority to foreclose the mortgage. *Dexter v. Morrow*, 76 Minn. 413 (79 N. W. Rep. 394). An agent having authority simply to receive bids for his principal's property, without power to consummate a sale, cannot appoint a subagent so as to bind his principal for commissions on a sale made to a purchaser found by such subagent. *Jones v. Brand*, Ky. (50 S. W. Rep. 679; 20 Ky. Law Rep. 1997). One employing an agent to sell land for him is not responsible for the latter's fraud in the organization with others of a corporation to purchase the land. *God-*

*frey v. Schenck*, 105 Wis. 568 (81 N. W. Rep. 656). A lot owner who by letter requests a real estate agent to find a purchaser for his lot, thereby does not authorize such agent to bind him by contract of sale. *McCullough v. Hitchcock*, 71 Conn. 401 (42 Atl. Rep. 81). The court say: "A real estate broker or agent is one who negotiates the sales of real property. His business, generally speaking, is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind the principal by signing a contract of sale. A sale of real estate involves the adjustment of many matters beside the fixing of the price. The delivery of the possession has to be settled; generally the title has to be examined; and the conveyance, with its covenants, is to be agreed upon and executed by the owner. All of these things require conferences, and time for completion. These are for the determination of the owner, and do not pertain to the duties, and are not within the authority, of a real estate agent. For these obvious reasons, and others which might be suggested, it is a wise provision of the law which withholds from such an agent, as we think it does, any implied authority to sign a contract of sale in behalf of his principal. *Coleman v. Garrigues*, 18 Barb. 60; *Roach v. Coe*, 1 E. D. Smith, 175; *Lindley v. Keim*, 54 N. J. Eq. 418-423 (34 Atl. Rep. 1073); *Duffy v. Hobson*, 40 Cal. 240 (6 Am. Rep. 617); 4 Am. & Eng. Enc. Law (2d Ed.) 964, note; 3 Waite, Act. & Def. 286, 287; *Hasley v. Monterio*, 92 Va. 581 (24 S. E. Rep. 258); *Armstrong v. Lowe*, 76 Cal. 616 (18 Pac. Rep. 758)."

**Sec. 678. Construction of statute requiring agent to have written authority—Revocation of authority.** Construing and applying N. J. Gen. Stat., p. 1602, § 10, providing "that no broker or real estate agent selling or exchanging land for or on account of the owner, shall be entitled to any commission for the sale or exchange of any real estate unless the authority for selling or exchanging such land is in writing signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been stated in such authority," it is held that a letter written and mailed by the owner of real estate to an agent, and received, is sufficient authority in writing to maintain recovery thereon for the commission for a sale or exchange effected by such agent, if the letter contains the authority to such agent to make the sale or exchange, and

the rate of commission therein is fixed pursuant to the statute. *Longstreth v. Korb*, 64 N. J. L. 112 (44 Atl. Rep. 934). An owner of lots who has empowered a broker to sell them and agreed to convey to him the lots remaining when a certain sum has been realized within a certain time, within the time given, cannot revoke the agent's authority and thus defeat his right to a conveyance. *Stamets v. Deniston*, 193 Pa. St. 548 (44 Atl. Rep. 575.)

**Sec. 679. Ratification of agent's acts.** A ratification of an invalid purchase on foreclosure by an agent who has been employed to sell the mortgaged property is not made by accepting the surplus and then waiting several years before instituting proceedings, when the principal has first claimed that he is entitled to an interest in the purchase, and, when that is denied, has attempted to get a resale. *Kimball v. Ranney*, 122 Mich. 160 (80 N. W. Rep. 992; 46 L. R. A. 403; 80 Am. St. Rep. 548). For particular case in which an unauthorized lease by an agent was held not to have been ratified by the principal, see *Schumacher v. Pabst Brewing Co.*, 78 Minn. 50 (80 N. W. Rep. 838).

**Sec. 680. Duties and liabilities of agent to his principal—Trust relation.** The agency of a real-estate agent and his duty to his principal ceases upon delivery of title and payment for the property; and after the termination of the agency the agent has the same right as any other person to deal in the property. *Board of Trustees v. Blair*, 45 W. Va. 812 (32 S. E. Rep. 203). Citing, *Walker v. Carrington*, 74 Ill. 446; *Walker v. Derby*, 5 Biss. 134 (Fed. Cas. No. 17068). An agent employed by one whose property is incumbered by a mortgage to sell the same and who is to receive for his services a commission upon a sale of the property for a certain price and one-half of any sum in excess of that price, cannot purchase the property for himself at a subsequent foreclosure sale thereof; and in case of such a purchase he will be held to have made it for the benefit of his principal. *Kimball v. Ranney*, 122 Mich. 160 (80 N. W. Rep. 992; 46 L. R. A. 403; 80 Am. St. Rep. 548). Where a real estate agent employed by his principal to obtain options for the purchase of lands, under an agreement that he is to share in the profits of their sale, afterward joins with the principal and others in the organization of

a company which purchases the land at a profit to the principal, without any knowledge of such profit or the agreement between the principal and agent, the agent is liable to the company for the profit he made on the transaction. *Woodbury Heights Land Co. v. Loudenslager*, N. J. (43 Atl. Rep. 671). Profits realized by an agent on a sale effected by his misrepresentations of the price at which the principal would sell the property, may be recovered by the purchaser; *Kice v. Porter*, Ky. (53 S. W. Rep. 285; 21 Ky. Law Rep. 871); and the fact that a prospective purchaser of land offers a broker a certain sum if he will procure a sale of the land to him at a price named by the purchaser, does not relieve the broker who accepts such employment from his duty to inform his principal that the property could be purchased for less, when such fact is known to him, *Carpenter v. Fisher*, 175 Mass. 9 (55 N. E. Rep. 479). The court say: "The fact that the principal names a sum as the sum he is willing to pay is in no sense final. One of the benefits which such a principal is entitled to receive from the broker, whose services he secures by his promise to pay for them, is information and aid enabling him to get the property for less than he is, without that information and aid, willing to pay." An agent employed by his principal to purchase lands for him who, by fraudulently representing the price of the land to be more than it really was, obtains the sum which such price exceeds the real consideration paid, will be held to account to his principal for the money so received; and he cannot defeat this liability by showing that his principal realized a profit in the transaction, even on the price represented to have been paid, or by showing that in making the original purchase he was acting for himself. *Salsbury v. Ware*, 183 Ill. 505 (56 N. E. Rep. 149). For exhaustive note on "Fraud and secret dealings or interest of real estate brokers as affecting their commissions" see 45 L. R. A. 33-53.

**Sec. 681. Recovery of commission—General principles and particular cases.** A real estate broker cannot recover a commission on a sale made at a time when he was operating without a license, as required by the statute (Tenn. Laws 1897, ch. 2, § 14), which was a misdemeanor, although after making the sale he paid his license tax and received a license dated prior to the making of the sale. *Saule v. Ryan* Tenn. (53 S. W. Rep. 977). A broker employed to

effect a sale of premises on certain terms is entitled to his commission when he procures a purchaser with whom the owner contracts to sell on different terms, who is able and willing to perform his agreement, but the sale is not consummated on account of defect in the owner's title. *Welch v. Young*, Ia. (79 N. W. Rep. 59). For exhaustive note on "Real estate broker's commissions as affected by the negligence, fraud, or default of the principal, and a defective title," see 43 L. R. A. 593-615. A broker employed to effect an exchange of land does not earn his commission by bringing a person to his employer who assumes to contract as owner, when in fact he is not the owner, as the broker knows, and the employer does not know; and who, within the few days allowed for performance, turns out unable to perform his contract, and irresponsible. *Burnham v. Upton*, 174 Mass. 408 (54 N. E. Rep. 873). A broker who has procured an executory contract of sale in accordance with the terms of his principal cannot be deprived of his commission because the sale never was consummated, on account of a third person claiming a lease on the property. *Reid v. Thompson*, Ky. (50 S. W. Rep. 248; 20 Ky. Law Rep. 1887). Where a property owner openly places his property for sale with several different agents, he is liable for commission only to the agent who consummates a sale, although it is made to a purchaser with whom another agent having the property for sale previously had made an unsuccessful attempt to sell. *Carper v. Sweet*, 26 Colo. 547 (59 Pac. Rep. 45). Particular fact case illustrating when a real estate agent will be entitled to commission, see *Carpenter v. Fisher*, 175 Mass. 9 (55 N. E. Rep. 479); *Wright v. Young*, 176 Mass. 100 (57 N. E. Rep. 212); *Moore v. Cresap*, 109 Ia. 749 (80 N. W. Rep. 399); *Hamill v. Baumhover*, 110 Ia. 369 (81 N. W. Rep. 600); *Marple v. Ives*, 111 Ia. 602 (82 N. W. Rep. 1017); *Kramer v. Ewing*, 10 Okla. 357 (61 Pac. Rep. 1064); *Kavanaugh v. Ballard*, Ky. (56 S. W. Rep. 159; 21 Ky. Law Rep. 1683). Particular facts held insufficient to show that a contract of sale had "fallen through" so as to deprive a broker of his right to commission. *Webber v. Holmes*, 174 Mass. 410 (54 N. E. Rep. 872). For particular cases as to the sufficiency of complaint in action to recover commission, see *Cannon v. Castleman*, 24 Ind. App. 188 (55 N. E. Rep. 111); *Lukin v. Halderson*, 24 Ind. App. 645 (57 N. E. Rep. 254). For exhaustive note on what constitutes

"Performance by a real estate broker of his contract to find a purchaser or effect an exchange of his principal's property," see 44 L. R. A. 593-631. For cases determining particular questions of evidence in actions by brokers to recover commissions, see *Singer & Talcott Stone Co. v. Hutchinson*, 184 Ill. 169 (56 N. E. Rep. 353).

**Sec. 682. Recovery of commission by agent who is cause of sale by owner.** In order for a broker to be entitled to his commission for procuring a purchaser it is not necessary that he obtain a written contract with his prospective purchaser, specific performance of which could be enforced, but if he finds a purchaser, ready, able and willing to purchase, and informs the owner thereof, and the purchaser is actually produced, he is entitled to his commission, though the owner afterward closes the deal with the purchaser for less than the offer made through the broker. *Barnes v. German Savings & Loan Soc.*, 21 Wash. 448 (58 Pac. Rep. 569). A real estate agent who, by his interviews with a former prospective purchaser, is the "procuring cause" of the latter examining the property and renewing negotiations which ultimately terminated in a sale to him directly by the owner, is entitled to his commission, although he did not have the exclusive sale of the property; and the owner cannot escape such liability by telling the broker after he has rendered such service that no commission will be paid in case the property brings only a certain price. *Hoadley v. Sav. Bank*, 71 Conn. 599 (42 Atl. Rep. 667; 44 L. R. A. 321; see pp. 321-352 for exhaustive note on "When real estate broker is considered as the procuring cause of the sale or exchange effected). A real estate agent who has been instrumental in procuring a purchaser for land listed with him for sale is entitled to his contract commission, even though the owner of the property consummates the sale in ignorance of the services rendered by the agent. *Craig v. Wead*, 58 Neb. 782 (79 N. W. Rep. 718).

**Sec. 683. Recovery of commission—Effect of purchaser's failure to complete his contract of purchase.** A broker has earned his commission when he has procured a satisfactory person who enters into an enforceable contract with his principal, although such purchaser afterward refuse to carry out the contract. *Hipple v. Laird*, 189 Pa. St. 472 (42 Atl. Rep.



46). A broker to whom a land owner has agreed to pay a certain sum as a commission if he would sell his farm, is entitled to his commission where he produces a purchaser with whom the land owner contracts to sell his farm for a stipulated price, which contract provides for the payment of liquidated damages on the failure of either party to perform, although the purchaser subsequently declined to take the property and paid the damages. *Parker v. Estabrooke*, 68 N. H. 349 (44 Atl. Rep. 484). The court say: "The general rule, upon the authorities, is that, to entitle a real estate broker to recover his commissions, he must show that he produced one who was both able and willing to purchase the property upon the terms proposed. *Chapin v. Bridges*, 116 Mass. 105; *Desmond v. Stebbins*, 140 Mass. 339 (5 N. E. Rep. 150); *Hayden v. Grillo*, 26 Mo. App. 289, 293; *Coleman's Ex'e v. Meade*, 13 Bush. 358, 363; *Kock v. Emmerling*, 22 How. 69; *Phelan v. Gardner*, 43 Cal. 306, 311; *Nesbitt v. Helser*, 49 Mo. 383, 385; *Gillett v. Corum*, 7 Kan. 156; *Hamlin v. Schulte*, 31 Minn. 486 (18 N. W. Rep. 415). In all the cases, under varying forms of expression, the fundamental doctrine is that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms upon which it is to be made, and that until this is done his right to commissions does not accrue. *Sibbald v. Iron Co.*, 83 N. Y. 378 (22 Am. Rep. 441). 'A broker is not entitled to commissions when the customer, through no fault of the seller, refuses to complete the contract; but it is different when the customer has entered into a contract binding upon both parties, or into an agreement to pay a stipulated sum as damages in case of refusal to complete the contract.' *Leete v. Norton*, 43 Conn. 219; *Coleman's Ex'r v. Meade*, 13 Bush. 358; *Veazie v. Parker*, 72 Me. 443; *Pearson v. Mason*, 120 Mass. 53; *Rice v. Mayo*, 107 Mass. 550; *Ward v. Cobb*, 148 Mass. 518 (20 N. E. Rep. 174)."

**Sec. 684. Recovery of commission for procuring loan.**

A broker employed to procure a loan is entitled to his commission when he has found a person able and willing to make the loan, where a defect in his principal's title is the cause of the failure to complete the transaction. *Fitzpatrick v. Gilson*, 176 Mass. 477 (57 N. E. Rep. 1000); *Maxon v. Jones*, 128 Cal. 77 (60 Pac. Rep. 516). See *Ballard's Law of Real Prop.*, Vol. I, §§ 355, 356. An executor who employs a broker

to procure a loan on the estate to be secured by mortgage thereon, by representing that he has a proper order of court authorizing the transaction and the consent of all the parties interested in it, is liable personally to the broker for his commission where he procures a party who is able and willing to make the loan and agrees to do so if the title is all right, but the transaction is not consummated because of the executor's inability to procure the proper order from the court to make the mortgage. *Maxon v. Jones*, 128 Cal. 77 (60 Pac. Rep. 516). One who contracted, for a stipulated commission, to obtain for another a loan of money, to be secured by a mortgage upon land belonging to the latter, is not entitled to compensation for services rendered in finding a person willing and ready to make the desired loan on condition that the applicant therefor had a good title to the land in question, when it appears that the latter in fact had such a title, and that the loan was refused because of an alleged cloud thereon, which was in law no cloud at all. *Hanesley v. Bagley*, 109 Ga. 346 (34 S. E. Rep. 584).

**Sec. 685. Recovery of commission from both parties—Agreement between brokers effecting exchange of land to divide commissions.** An agent to sell cannot become at the same time the agent of the purchaser, nor may the agent to buy become the agent to sell, so as to be entitled to a commission from both seller and buyer, unless the principals are duly acquainted with the fact that the agent is acting in such dual capacity; but a broker who is not employed to negotiate the sale or purchase, but simply as a mere middleman to bring the two parties together and permit them to make their own bargain, may recover an agreed compensation from either or both, though neither may know that compensation from the other is expected. *Friar v. Smith*, 120 Mich. 411 (79 N. W. Rep. 633; 46 L. R. A. 229). The last proposition stated above is supported by *Clark v. Allen*, 125 Cal. 276 (57 Pac. Rep. 985). and in support of this proposition the court in the first case cited, say: "This is on the ground that such employment does not place the broker in a position where he can sacrifice the interests of his principal, and because he is not, as agent of the owner, bound to secure the best price obtainable, or, as agent of the buyer, to purchase at the least price at which the property can be bought, as in such case he has nothing to do with fixing the price. Neither party has contracted for his skill,

knowledge or influence, and he stands entirely indifferent between them. *Mechem, Ag. § 973; Ranney v. Donovan*, 78 Mich. 318 (44 N. W. Rep. 276); *Montross v. Eddy*, 94 Mich. 100 (53 N. W. Rep. 916; 34 Am. St. Rep. 323); *Rupp v. Sampson*, 16 Gray, 398 (77 Am. Dec. 416); *Orton v. Scofield*, 61 Wis. 382 (21 N. W. Rep. 261)."

An agreement between two brokers negotiating an exchange of lands between their principals that they will equally divide between themselves all commissions realized out of the transactions, although unknown to the principals, is not such fraud as will deprive them of the right to collect their commissions; it not appearing that either broker was placed by such arrangement in any better or worse condition than without it, or that in any way he was subjected to any other or different temptation to act adversely to the interests of the principal than that naturally and ordinarily arising out of the nature of his employment. *Alvord v. Cook*, 174 Mass. 120 (54 N. E. Rep. 499).

**Sec. 686. Miscellaneous notes.** An ordinance of a city authorized by its charter requiring real estate brokers doing business within the city to pay an annual license tax is constitutional. *City of St. Louis v. McCann*, 157 Mo. 301 (57 S. W. Rep. 1016). Where an agent having the sale of property, without his principal having any knowledge of his interest in the transaction, sells the property to a firm of which he is a member, the other members of the firm cannot recover damages of the principal for the misrepresentations of the agent. *Pineville Land & Lumber Co. v. Hollingsworth*, Ky. (53 S. W. Rep. 279; 21 Ky. Law Rep. 899).

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## RECORDS AND RECORDING

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### EPITOME OF CASES.

**Sec. 687. What instruments may be recorded.** Registry laws may be held to apply to instruments executed before the date of their taking effect, as against the holder of an in-

strument required by them to be recorded who had reasonable time after such date in which to record his instrument before the rights of a subsequent bona fide purchaser attached. *Citizens' State Bank v. Julian*, 153 Ind. 655 (55 N. E. Rep. 1007). Only original instruments, and not copies, are entitled to be recorded. *Mack v. McIntosh*, 181 Ill. 633 (54 N. E. Rep. 1019). A bond for title to land and writings assigning it are not required to be recorded by Ala. Code 1896, § 105. *Cochran v. Adler*, 121 Ala. 442 (25 So. Rep. 761). The record of a spurious deed never executed or acknowledged by the apparent grantor, though her signature thereto was genuine, but was obtained by some trick or artifice, as was also the signature of a notary public to a spurious acknowledgment clause, will not be any protection, as against the owner of the property to persons who advance money in reliance on the record, since the recording laws apply to genuine instruments only, and not to forged ones. *Marden v. Dorthy*, 160 N. Y. 39 (54 N. E. Rep. 726; 46 L. R. A. 694). The recording of a deed of trust which shows on its face that the grantor's acknowledgment thereto was taken before the trustee named therein, is improper and does not impart constructive notice to subsequent purchasers, under Mo. Rev. Stat. 1889, § 2419; and § 4864 making records, made one year before the passage of the law, of unacknowledged deeds and conveyances, or deeds and conveyances imperfectly acknowledged, constructive notice, does not apply to instruments recorded after its taking effect. *German-American Bank v. Carondelet Real Estate Co.*, 150 Mo. 570 (51 S. W. Rep. 691). U. S. Rev. Stat., § 905; 3 Starr & C. Ann. Ill. Stat., (2nd Ed.) p. 4040, § 9 construed and applied—recording certified copy of will executed in a foreign state. *Harrison v. Weatherly*, 180 Ill. 418 (54 N. E. Rep. 237).

**Sec. 688. What constitutes a recording—Deposit of instrument with recording officer.** The designation of the seal of a corporation to a deed executed by it on the record by the use of the word "[Seal]" is sufficient. *Ellison v. Barnstrator*, 153 Ind. 146 (54 N. E. Rep. 433). Where the statute requires a recording officer to note the time of his reception of an instrument for recording and that every instrument is considered as recorded at the time so noted, it is held that an instrument received by such officer at his office from one who desires to have it recorded during ordinary business hours of

a Saturday afternoon will be deemed to be recorded from that time, although the office was not open at the time to the general public on account of his custom to close of Saturday afternoons. Mass. Pub. Stat., ch. 24, §§ 15, 21; ch. 191, §§ 6, 7; ch. 192, § 4; ch. 147, § 12, construed and applied. *Orne v. Barstow*, 175 Mass. 193 (55 N. E. Rep. 896). In the case of *Shepard v. Murphy*, 26 Colo. 350 (58 Pac. Rep. 588), the supreme court of Colorado say: "If the instrument which our statute requires to be recorded in a public office is lodged with the proper officer, and the person so depositing it does all that the law requires of him as conditions precedent to the right to have it recorded, or if these conditions are and can be waived by the officer, it is constructive notice to all those who thereafter deal with the property, even if the recorder neglects to record it. We are aware that there are some cases, particularly among the earlier ones, apparently opposed to this conclusion, such as *Sawyer v. Adams*, 8 Vt. 172 (30 Am. Dec. 459); *Sanger v. Craigie*, 10 Vt. 555; *Barney v. McCarty*, 15 Ia. 510 (83 Am. Dec. 427); *Nickson v. Blair*, 59 Ia. 531 (13 N. W. Rep. 641); *Yerger v. Barz*, 56 Ia. 77 (8 N. W. Rep. 769); but we are of opinion that the doctrine they lay down, if contrary to our conclusion, is unsound. The better rule is expressed substantially as we have phrased it, in *Wade, Notice*, §§ 162, 170, and cases cited; *I Lind. Mines*, § 390, and cases cited; *Hoffman v. Mackall*, 5 O. St. 124 (64 Am. Dec. 637); *Merrick v. Wallace*, 19 Ill. 486; *People v. Bristol*, 35 Mich. 28; *Beverly v. Ellis*, 1 Rand. (Va.) 102; *Myers v. Spooner*, 55 Cal. 257; *Nichols v. Reynolds*, 1 R. I. 30 (36 Am. Dec. 238); *Harrold v. Simonds*, 9 Mo. 326; *Bigelow v. Topliff*, 25 Vt. 273 (60 Am. Dec. 264); *Booth v. Barnum*, 9 Conn. 286 (23 Am. Dec. 339)."

**Sec. 689. Effect of alterations by recording officer—Liability for his failure to index instruments.** The priority acquired by the delivery of a deed to the proper recording officer, accompanied by the payment of his fees and his making the proper indorsement on the deed of its admission to record and the date thereof, cannot be affected by the officer changing such entry without the knowledge of the person claiming under the deed, although done in pursuance of instructions from his agent. *Mercantile Co-operative Bank v. Brown*, 96 Va. 614 (32 S. E. Rep. 64). Construing and applying Ala. Laws 1886-87, p. 661, requiring probate judges "to prepare

and keep a general, direct and reverse index of the records in his office, of all deeds and mortgages of lands or any estate or interest therein," it is held the statute renders such judge liable on his official bond for all damages approximately resulting to a purchaser of mortgaged land relying on such indexes, on account of a mortgage affecting it not being indexed therein. *Norton v. Kumpe*, 121 Ala. 446 (25 So. Rep. 841). In discussing the statute the court say: "A ministerial duty was thus enjoined upon the probate judge, as the recording officer, in which all persons affected by the notice imparted by registration, and all having occasion to use the index in the examination of the records, have a direct interest. It is a principle of general application that for the neglect of a ministerial duty which a public officer owes, not merely to the public, but to individuals, an action will lie in favor of the individual who may be injured thereby. *Cooley*, Torts, 383; *Commissioners v. Duckett*, 20 Md. 468 (83 Am. Dec. 557); *Stephenson v. Manufacturing Co.*, 28 C. C. A. 292 (84 Fed. Rep. 114). And the motive of the officer is immaterial. *Clark v. Miller*, 54 N. Y. 528. The principle applies to a recording officer for failure to comply with a statutory requirement to index records of conveyances. *Throop*, Pub. Off. 743; *Cooley*, Torts, 383, 386; *Hunter v. Windsor*, 24 Vt. 327; *Green v. Garrington*, 16 O. St. 549 (91 Am. Dec. 103); *Morton v. Smith*, Tex. Civ. App. (44 S. W. Rep. 683); *Insurance Co. v. Dake*, 87 N. Y. 257; *Jennings' Lessee v. Wood*, 20 Ohio, 261; 20 Am. & Eng. Enc. Law, 564. The direction to prepare and keep a general, direct and reversed index of prior as well as subsequent recorded conveyances was as imperative, and demanded the same measure of care and accuracy in its execution, as did the statutory direction to record and index in the first instance. The purpose of the enactment was to afford facilities for a search of the record, and such purpose would fail if no reliance could be had upon the general index. If it carried no presumption of verity, the searcher must resort to the records, as if there was no general index. The general index, if consulted at all, would become a snare, rather than a guide, if, when purporting to point to all incumbrances, it was silent as to some. The mere constructive notice which the registration statutes impute from the filing of a conveyance for record is for the protection of those claiming under the conveyance, and does

not exist for the protection of the recording officer from liability for non-performance of official duty."

**Sec. 690. Records as notice—Priorities.** Statutes giving preference to deeds on account of registration apply only to deeds made upon valuable consideration. *Toole v. Toole*, 107 Ga. 472 (33 S. E. Rep. 686); *Byrd v. Aspinwall*, 108 Ga. 1 (33 S. E. Rep. 688). A bona fide grantee for a valuable consideration of one who has taken a conveyance to defraud creditors is not charged with notice of an intervening sheriff's deed executed and recorded in pursuance of an execution sale of the property against the original owner. *White v. McGregor*, 92 Tex. 556 (50 S. W. Rep. 564; 71 Am. St. Rep. 875). Construing and applying Pa. Pub. Laws 1875, p. 32, requiring recorders of deeds to prepare and keep in their offices direct and ad sectam indexes of deeds and mortgages, and providing that "the entry of recorded deeds and mortgages in such indexes respectively shall be notice to all persons of the recording of the same," it is held that a grantee's recording a purchase money mortgage executed by him to the grantor does not protect him against subsequent conveyances by the latter, where his deed is not recorded. *Pyles v. Brown*, 189 Pa. St. 164 (42 Atl. Rep. 11; 69 Am. St. Rep. 794). One taking a mortgage from a junior grantee whose deed is first recorded after the recording of a prior deed from the same grantor to another, has the burden of showing, as against the first grantee, that the mortgagor was a bona fide purchaser for value from their common grantor without notice of the prior conveyance. *Parrish v. Mahany*, 12 S. Dak. 278 (81 N. W. Rep. 295; 76 Am. St. Rep. 604). The rule that a grantee is under no obligation to search the records anterior to the vesting of the legal title in his grantor cannot be applied in a case where two mortgagees claim title from the same grantor, and in a state where the register of deeds keeps an alphabetical cross index of all instruments recorded affecting real estate, and county abstract books are kept, in which an abstract of every deed is entered under headlines describing the legal subdivisions of land according to the United States surveys. *Balch v. Arnold*, Wyo. (59 Pac. Rep. 434). The record of a mortgage is constructive notice of the existence of the debt which the mortgage was given to secure. *Whitney v. Lowe*, 59 Neb. 87 (80 N. W. Rep. 266).

A duly filed and recorded deed given as security for a debt, but which does not show when the same matures, is notice to one dealing with the grantor therein of all the rights that the grantee has under the contract, performance of which thereby is secured, where the deed in terms refers to the bond for title held by the grantor as containing the "terms and conditions" of the contract of indebtedness. *Mattlage v. Mulherin*, 106 Ga. 834 (32 S. E. Rep. 940).

**Sec. 691. Records as notice—Defective instruments and imperfect descriptions.** The record of an instrument not entitled to be recorded is of no avail as notice so as to give the instrument any priority, *Mack v. McIntosh*, 181 Ill. 633 (54 N. E. Rep. 1019); *Salvage v. Haydock*, 68 N. H. 484 (44 Atl. Rep. 696); *McAllister v. Purcell*, 124 N. C. 262 (32 S. E. Rep. 715); and where the certificate of acknowledgment to a recorded deed is so defective as to render the record ineffectual as notice, is afterward reformed by a judicial action, the record of the instrument becomes notice to third parties only from the time the correction is made, and does not relate back and give constructive notice from the time of the recording of such instrument, *Ariz. Rev. Stat.*, §§ 2601, 2621 construed and applied. *Reid v. Kleyensteuber*, *Ariz.* (60 Pac. Rep. 879). A statute (*Va. Laws 1893-94*, p. 580) curing the defective acknowledgement of a deed and the consequent defect in the record thereof is ineffectual to give it priority over a judgment lien acquired before the passage of the statute. *Merchants' Bank v. Ballou*, 98 Va. 112 (32 S. E. Rep. 481; 44 L. R. A. 306).

The record of a deed will not be deprived of its effect as notice on account of the imperfect description of the lands affected thereby if they are so described or identified as to afford a subsequent purchaser or incumbrancer the means of ascertaining with accuracy what lands were intended. *Florence v. Morier*, 98 Va. 26 (34 S. E. Rep. 890). The principle of this case is supported by *Edwards v. Bender*, 121 Ala. 77 (25 So. Rep. 1010). But the record of a deed, the description in which omits the township in which the lands lay, does not constitute constructive notice to a subsequent grantee, although the description is capable of being made good between the parties to the deed by other evidence. *Ozark Land & Lumber Co. v. Franks*, 156 Mo. 673 (57 S. W. Rep. 540). Parties



making a conveyance are presumed to make it with reference to the state or condition of the premises at the time, and, if the description be sufficient when made, no subsequent changes in conditions can make it invalid. Hence, when an intending purchaser searches the records to ascertain the state of the title, and finds a deed of record, good on its face, made by a common grantor, he cannot with impunity ignore it simply because he fails to find of record any property to which the given description is applicable, but must inquire outside of the record whether or not there was at the time the deed was made property to which the description can be applied, and whether the deed conflicts with the title to the property he intends purchasing. If he fails so to inquire, and such deed afterward proves to affect property he has purchased, he must be held to have purchased with constructive notice. *Sengfelder v. Hill*, 21 Wash. 371 (58 Pac. Rep. 250).

**Sec. 692. Unrecorded instruments.** A duly recorded deed to a purchaser at an execution sale is entitled to priority over an unrecorded deed from the defendant in execution of which the purchaser had no notice, though made before the rendition of the judgment under which the sale was made. *McCandless v. Inland Acid Co.*, 108 Ga. 618 (34 S. E. Rep. 142). An unrecorded deed takes precedence over subsequent judgments entered against the grantor, where the grantee was in actual open and visible possession of the premises and had given a purchase mortgage on them which was recorded. *Adams v. Tolman*, 180 Ill. 61 (4 N. E. Rep. 174). One taking from a lessee a mortgage on crops to be grown by him is not charged with constructive notice of a stipulation by the latter in his lease which is not recorded to give his landlord a crop mortgage as additional security for the payment of rent, from the fact that the party taking the mortgage had knowledge of the lease, the lessor, the term and the cash rent to be paid, where he had searched the record, for a copy of the lease. *Wilkerson v. Thorp*, 128 Cal. 222 (60 Pac. Rep. 679). Notice to trustees in a deed of trust given to secure creditors of the existence of a prior unrecorded conveyance is sufficient to give the unrecorded conveyance priority over them and their beneficiaries, although such trustee did not know of the debtor's intention to execute the deed nor of its recording until afterward. *Merchants' Bank v. Ballou*, 98 Va. 112 (32 S. E. Rep. 481;

44 L. R. A. 306). Particular recitals in conveyances by a husband and wife to third parties held to charge the grantee with notice of a prior unrecorded deed of the land by the husband to his wife. *Zorn v. Thompson*, 108 Ga. 78 (34 S. E. Rep. 303).

**Sec. 693. Notice of unrecorded instrument—Burden of proof.** The burden is cast upon a party who relies upon an unregistered deed or instrument, against one who claims to be a purchaser for a valuable consideration, without notice, of the property sought to be affected by such unrecorded deed or instrument, to allege and prove that such purchaser had notice or knowledge, at the time of his purchase, of such deed or instrument. The payment of a valuable consideration by such purchaser, as the authorities assert, raises a presumption in his favor of good faith in so doing, or, in other words, that at the time of the payment he had no knowledge of unrecorded titles, liens, equities or rights of other persons; and the burden, therefore, rests upon the party asserting the contrary to overcome such presumption by proving actual notice. *Citizens' State Bank v. Julian*, 153 Ind. 655 (55 N. E. Rep. 1007). Citing, *Morris v. Daniels*, 35 O. St. 406; *Center v. Bank*, 22 Ala. 743; *Bartlett v. Varner's Ex'r*, 56 Ala. 580; *Pollak v. Davidson*, 87 Ala. 551 (6 So. Rep. 312); *Spofford v. Weston*, 29 Me. 140; *Ryder v. Rush*, 102 Ill. 338; *Rogers v. Wiley*, 14 Ill. 65 (56 Am. Dec. 491); *Brown v. Welch*, 18 Ill. 343 (68 Am. Dec. 549); *Bush v. Golden*, 17 Conn. 594; *Pomroy v. Stevens*, 11 Metc. (Mass.) 244; *Newton v. McLean*, 41 Barb. 285; *Fish. Mortg.* (5th Ed.) § 1105; *White & T. Lead. Cas. Eq.* 99; 16 Am. & Eng. Enc. Law, 842. One claiming as a purchaser at a foreclosure sale had under a mortgage which was unrecorded at the time a prior judgment creditor acquired a lien on the land, has the burden of showing that such creditor had notice of the mortgage prior to the acquisition of his lien, as against a purchaser at an execution sale under the judgment. *Barnett v. Squyres*, 93 Tex. 193 (54 S. W. Rep. 241; 77 Am. St. Rep. 854).

**Sec. 694. Miscellaneous notes.** A deed of assignment embracing lands in a county other than that of the residence of the assignor must be recorded in such county, in order to be effective against a subsequent bona fide purchaser

without notice. Ohio Rev. Stat., § 4134. *Eggleston v. Harrison*, 61 O. St. 397 (55 N. E. Rep. 993). While, under Ky. Stat., § 520, the state tax must be paid before a deed acknowledged and left for record will operate as notice to creditors or innocent purchasers for value, yet, as between the parties and persons having notice of such transfer, the title passes. *Martin v. Bates*, Ky. (50 S. W. Rep. 38; 20 Ky. Law Rep. 1798).

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### TIME FOR RECORDING.

[In Vol. II, §§ 563-611; Vol. III, §§ 638-648; Vol. IV, §§ 717-722; Vol. V, §§ 746-759; Vol. VI, §§ 765-782; Vol. VII, §§ 680-685, will be found a compilation of the statutory provisions of the several states and territories in reference to the time for recording deeds, etc. Below we note such amendments, changes and additional constructions as have been made.]

#### **Sec. 695. Alabama.**

(See Vol. II, § 563; Vol. III, § 638; Vol. V, § 746; Vol. VI, § 765; Vol. VII, § 680.) A bond for title to land and writing assigning it are not required to be recorded by Code 1896, § 105. *Cochran v. Adler*, 121 Ala. 442 (25 So. Rep. 761).

#### **Sec. 696. Arizona.**

(See Vol. II, § 564.) Rev. Stat., §§ 2601, 2621, construed and applied—recording instruments defectively acknowledged as notice—reformation of defects. *Reid v. Kleyensteuber*, Ariz. (60 Pac. Rep. 879).

#### **Sec. 697. California.**

(See Vol. II, § 566.) A lease for a term of years is a conveyance within the meaning of Cal. Civ. Code, §§ 1214, 1215. *Commercial Bank v. Pritchard*, 126 Cal. 600 (59 Pac. Rep. 130)

#### **Sec. 698. Georgia.**

(See Vol. II, § 572; Vol. VI, § 766.) The preference given to deeds on account of being recorded, by Code, §§ 2778, 3530, 3618, is confined to deeds made upon valuable consideration. *Toole v. Toole*, 107 Ga. 472 (33 S. E. Rep. 686); *Byrd v. Aspinwall*, 108 Ga. 1 (33 S. E. Rep. 688). A duly recorded deed to a purchaser at an execution sale is entitled to priority over an unrecorded deed from the defendant in execution of

which the purchaser had no notice, though made before the rendition of the judgment under which the sale was made. *McCandless v. Inland Acid Co.*, 108 Ga. 618 (34 S. E. Rep. 142). The failure to record, within one year from its date, a deed executed in 1884, would postpone such deed to one subsequently made by the same grantor, and which was filed and recorded in due time, if the grantee in such subsequent deed took the same without notice of the existence of the first deed. If such subsequent deed be void because infected with usury, the first deed, though unrecorded, will prevail. *White v. Interstate Bldg. & L. Ass'n*, 106 Ga. 146 (32 S. E. Rep. 26).

**Sec. 699. Michigan.**

(See Vol. II, § 583; Vol. VII, § 686.) A grantee in a quitclaim deed, although he purchases for value and without notice, cannot claim as a bona fide purchaser under Comp. Laws 1897, § 8998, as against a prior unrecorded deed. *Beakley v. Robert*, 120 Mich. 209 (79 N. W. Rep. 193).

**Sec. 700. Minnesota.**

(See Vol. II, § 584; Vol. VI, § 771; Vol. VII, § 687.) Construing and applying Gen. Stat. 1894, § 4180, which provides that every conveyance of real estate, by deed, mortgage, or otherwise, shall be recorded in the office of the register of deeds for the proper county, and if not so recorded shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof, it is held that a junior grantee claiming under a deed first recorded is not required to prove that he is a good faith purchaser for a valuable consideration, as against a stranger to the title who does not claim under a prior deed from the same grantor. *Barber v. Robinson*, 78 Minn. 193 (80 N. W. Rep. 968).

**Sec. 701. Missouri.**

(See Vol. II, § 586; Vol. V, § 751; Vol. VII, § 688.) Under Rev. Stat., § 543, the lien of an attachment dates from the filing of an abstract of attachment in the recorder's office. *Winningham v. Trueblood*, 149 Mo. 572 (51 S. W. Rep. 399).

**Sec. 702. North Carolina.**

(See Vol. II, § 594; Vol. III, § 644; Vol. IV, § 722; Vol. V, § 755; Vol. VI, § 774; Vol. VII, § 692.) Laws 1885, p. 233, repealing Code, § 1245, does not apply to the registration of grants from the state. *Wyman v. Taylor*, 124 N. C. 426 (32 S. E. Rep. 740).

**Sec. 703. North Dakota.**

(See Vol. V, § 756.) Rev. Codes 1899, § 1278—deed not to be

recorded without auditor's certificate of taxes paid—amended, Laws, 1901, p. 188.

#### **Sec. 704. Ohio.**

(See Vol. II, § 596; Vol. VI, § 775; Vol. VII, § 693.) A lease or license to operate upon land for natural gas or petroleum, until filed for record as required by § 4112a of the Revised Statutes, is without any effect, either at law or in equity, as against a subsequent lessee, or licensee, or other third person acquiring an interest in or lien on the land, although he took with notice of such prior unrecorded lease or license, unless the person claiming thereunder was at the time in the actual possession of the land. *Northwestern Ohio Nat. Gas Co. v. City of Tiffin*, 59 O. St. 420 (54 N. E. Rep. 77). Applying Rev. Stat., § 4134, it is held that a deed of assignment which embraces land of the assignor situate in a county other than that of his residence, in order to be effective as against a subsequent bona fide purchaser, having at the time of the purchase no knowledge of the deed of assignment, must be entered for record in the office of the recorder of the county where the land is situate; and if such purchaser first duly enter his deed for record in the office of the recorder of that county he will take a good title as against the assignee. *Eggleston v. Harrison*, 61 O. St. 397 (55 N. E. Rep. 993).

#### **Sec. 705. Rhode Island.**

(See Vol. II, § 600.) Where there was no actual delivery of a deed until after it had been recorded, and constructive delivery prior to that time is not shown, a mortgage left for record prior to the actual delivery of the deed is entitled to precedence in respect to the deed. *Cook v. Cook*, R. I. (43 Atl. Rep. 537).

#### **Sec. 706. South Dakota.**

(See Vol. VI, § 778.) A creditor filing attachment proceedings against a grantor after the execution and delivery of his deed, but before it is recorded, is not a purchaser or incumbrancer in good faith and without notice, within the meaning of Comp. Laws, § 3293, declaring that every conveyance of real property is void as against any such subsequent purchaser or incumbrancer whose conveyance is first duly recorded. *Kohn v. Lapham*, 13 S. Dak. 78 (82 N. W. Rep. 408).

#### **Sec. 707. Texas.**

(See Vol. II, § 604; Vol. VI, § 779.) Construing and applying Sayles' Civ. Stat., § 4640, declaring that until recorded, all conveyances of land "shall be void as to all creditors and subsequent purchasers for valuable consideration, without notice," it is held that notice to a judgment creditor of an unrecorded deed or mortgage, either actual or constructive, at the time he fixes his lien upon the land, is as fatal to his

rights, as against the holder of an unrecorded deed, as it would be against a subsequent purchaser. *Barnett v. Squyres*, Tex. Civ. App. (52 S. W. Rep. 612). The recording of a sheriff's deed to land, under an execution sale thereof made after the conveyance of the land by the execution debtor to another in fraud of his creditors, is not notice to a subsequent bona fide purchaser for a valuable consideration without notice, from his grantee. *White v. McGregor*, 92 Tex. 556 (50 S. W. Rep. 564; 71 Am. St. Rep. 875).

#### **Sec. 708. Virginia.**

(See Vol. II, § 607; Vol. III, § 647; Vol. VI, § 781; Vol. VII, § 695.) Code, § 2465, providing that a deed while unrecorded shall not affect "subsequent purchasers for value, and creditors," applies to all creditors, and not to subsequent creditors only. *Price v. Wall's Ex'r*, 97 Va. 334 (33 S. E. Rep. 599; 75 Am. St. Rep. 788).

#### **Sec. 709. Washington.**

(See Vol. II, 608; Vol. V, § 758.) The term "bona fide purchasers" in the recording act of Washington (1 Hill's Ann. Stat. & Codes, § 1439) does not include a judgment creditor or an execution creditor purchasing at his own sale. *Dawson v. McCarty*, 21 Wash. 314 (57 Pac. Rep. 816; 75 Am. St. Rep. 841); *Hacker v. White*, 22 Wash. 415 (60 Pac. Rep. 1114; 79 Am. St. Rep. 945).

#### **Sec. 710. West Virginia.**

(See Vol. II, § 609.) Under Code, ch. 75, § 5, an unrecorded deed is void as to creditors whether they have notice or not, but it will be good as against purchasers with notice, or who have not purchased for a valuable consideration. *Abney v. Ohio Lumber & Mining Co.*, 45 W. Va. 446 (32 S. E. Rep. 256).

#### **Sec. 711. Wisconsin.**

(See Vol. II, § 610; Vol. III, § 648; Vol. V, § 759; Vol. VI, § 782.) Rev. Stat., §§ 2241, 2242, which protect "a subsequent purchaser in good faith and for a valuable consideration," who first records his conveyance, from the effect of a prior unrecorded conveyance, do not extend to attaching creditors. *Karger v. Steele-Wedeles Co.*, 103 Wis. 286 (79 N. W. Rep. 216).

# REDEMPTION

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## EPITOME OF CASES.

**Sec. 712. Nature of right to redeem and who may exercise it.** In discussing the nature of the right to redeem from an execution sale, in the case of *Paddack v. Staley*, 13 Colo. App. 363 (58 Pac. Rep. 363), the court of appeals of Colorado say: "The right to redeem from an execution sale is purely a statutory one. It does not exist without the statute, and it is only under and by virtue of some statutory right that parties may attack the title which the purchaser obtains at an execution sale regularly held on a valid judgment. All the authorities agree on this proposition. *Ror. Jud. Sales*, ch. 18, § 1184 et seq.; 2 *Freem. Ex'ns*, ch. 23, § 314 et seq. Many cases to this direct point might be cited, but the general doctrine and the supporting decisions are referred to in these text-books. We do not intend to hold that there may not, under some circumstances, be an equitable right of redemption. This phrase, 'equitable right of redemption,' must not, however, be taken according to the ordinary significance of the words, nor must it be taken in its broadest or fullest extent. All we intend to hold is that a party having a right of redemption, which he has attempted to exercise under and according to the statute, but which he has failed to effectuate by reason of some excusable fact, or where he has attempted to make it and his right has been refused by the officer holding the execution, or where, by reason of collusive judgments which are fraudulent as to him, he is unable to complete his statutory redemption, he may file a bill in equity setting up the facts on which his rights rest, the facts which constitute his excuse or which obstructed the redemption, and, making due proof, obtain a decree which shall establish it. But in the end the result is that the decree simply establishes his legal statutory right. There may be other cases than those which we have suggested under which a bill might be filed to this end. We do not undertake to state all possible exceptions. We hold that there is no such general right."

Upon the death of a mortgagor his equitable right to redeem passes to his heirs. *Rainey v. McQueen*, 121 Ala. 191 (25 So. Rep. 920). A junior incumbrancer is entitled to redeem from a senior incumbrance and to an assignment of the security redeemed. *Anderson v. McCloud-Love Live Stock Co.*, 58 Neb. 670 (79 N. W. Rep. 613). A party having an equitable mortgage, in the form of an absolute conveyance or transfer of land, may redeem as "a creditor having a lien," without first having obtained a judicial determination that the conveyance or transfer is a mortgage. *Scheibel v. Anderson*, 77 Minn. 54 (79 N. W. Rep. 594; 77 Am. St. Rep. 664). Construing and applying Ind. Rev. Stat. 1894, § 782 (Rev. Stat. 1901, § 782), providing that lands sold under a judgment, when redeemed by the owner, shall be subject to resale to pay balance due on the judgment, it is held that the word "owner" means any owner of the real estate redeemed, whose interest was subject to the payment of the judgment, without regard to whether he is the judgment debtor, or claims under him. *Lemmon v. Osborn*, 153 Ind. 172 (54 N. E. Rep. 1058). A grantee of an equity of redemption cannot occupy any better position than that of his grantor. *Miller v. Williams*, Colo. (59 Pac. Rep. 740).

**Sec. 713. Redemption by judgment creditors.** The fact that a judgment creditor is make a party to a proceeding to foreclose a mortgage does not affect his right to redeem as such from the sale had thereunder; nor is this right lost by merger on account of his taking a conveyance of the premises from the mortgagor after the expiration of the time allowed to the latter for redemption. *Bethmann v. Bowman*, 181 Ill. 421 (55 N. E. Rep. 148; 72 Am. St. Rep. 265). Ia. Code 1873, §§ 3114, 3115 construed and applied—redemption of junior lienor—entry on sale book of amount he is willing to credit on his claim. *Meredith, Dickey & Co. v. Peterson*, 108 Ia. 551 (79 N. W. Rep. 351). Mills' Ann. Colo. Stat., §§ 2547, 2548 construed and applied—redemption from execution sale—rights of judgment creditor. *Paddack v. Staley*, 13 Colo. App. 363 (58 Pac. Rep. 363).

**Sec. 714. Redemption from mortgage foreclosure—General principles—Statutes construed.** The restrictions which courts place upon mortgagors in surrendering to their



mortgagees their equities of redemption do not prevent the parties to a mortgage, by fair agreement, from extinguishing the mortgage and substituting therefor a simple option to purchase. *Kunert v. Strong*, 103 Wis. 70 (79 N. W. Rep. 32). The statutory right of a mortgagor to redeem exists in favor of the owner of the land, as against one holding the legal title thereof as security for debt. *Harrington v. Foley*, 108 Ia. 287 (79 N. W. Rep. 64). A stranger to the title of the mortgagor, one who claims no subsisting interest under him and who does not act by his authority, although he alleges ownership of the land, cannot compel an accounting under the mortgage so as to permit him to redeem. *Hazen v. Nicholls*, 126 Cal. 327 (58 Pac. Rep. 816). Where a purchaser of land at a sale thereof under a power of sale contained in a mortgage declined to complete the sale and the mortgagee afterward took the land at the price bid, and went into possession, without paying any consideration to the first purchaser, he will be treated as a purchaser at his own sale, so as to give the mortgagor's heir the right to redeem. *Rainey v. McQueen*, 121 Ala. 191 (25 So. Rep. 920). A mortgagor who postpones making his redemption on account of those interested in the sale assuring him that he will not be pushed and through a mistake on the part of all of them as to the time within which such redemption can be made, may be permitted to redeem after the legal period of redemption has expired. *Benson v. Bunting*, 127 Cal. 532 (59 Pac. Rep. 991; 78 Am. St. Rep. 81). Where a junior mortgagee, made a party to a suit to foreclose a senior mortgage, sets up his mortgage and prays for a foreclosure of it and sale of the premises, and the court decrees a foreclosure of both mortgages and a sale under them, he cannot redeem from the sale. *San Jose Water Co. v. Lyndon*, 124 Cal. 518 (57 Pac. Rep. 481). In Indiana it is held that where a party entitled to redeem from a mortgage lien is not a party to the decree foreclosing such mortgage, the judgment, so far as he is concerned, is a mere nullity, and the equity of redemption which he may have in the mortgaged premises is not affected thereby; and, under such circumstances, in order to redeem, he is only required to pay the mortgage debt, with the interest thereon. *Butler v. Thornburg*, 153 Ind. 530 (55 N. E. Rep. 417). The receiver of a mortgagee, appointed by a court of competent jurisdiction, and who has the equitable title to the mortgage and sole authority to enforce it, is a necessary party

to an action by the mortgagor to redeem. *Southern Mut. Bldg. & L. Ass'n v. Andrews*, 122 Ala. 598 (26 So. Rep. 113). One redeeming from a foreclosure sale to satisfy a portion of the debt due becomes the assignee of the purchaser, succeeds only to his rights, and takes subject to a *lis pendens* preserving the lien of the entire debt against the property. *Dupree v. Salt Lake Val. L. & T. Co.*, 20 Utah, 103 (57 Pac. Rep. 845; 77 Am. St. Rep. 902). In Kansas it is held that a mortgagor who seeks to redeem must pay the entire amount of the mortgage debt; and where the property has been sold under the mortgage for less than the mortgage debt, a redemption cannot be effected by his tendering the amount of the sale. *Doster, C. J.*, dissenting. *Evans v. Kahr*, 60 Kan. 719 (57 Pac. Rep. 950; 58 Pac. Rep. 467). Utah Rev. Stat. 1898, § 3267 construed and applied—special proceeding to redeem real estate sold under a mortgage. *Standard Steam Laundry v. Dole*, Utah, (61 Pac. Rep. 1103).

**Sec. 715. Agreement to permit redemption—Change in redemption statute.** A purchaser at a sale under a judgment enforcing liens cannot escape performance of his agreement with his judgment debtor made before the sale that he will permit him to redeem, by showing that the latter induced other persons not to bid against the purchaser. *Crane v. Arnold*, Ky. (57 S. W. Rep. 11). Changes in redemption statutes may be given an retroactive effect. *State Sav. Bank v. Mathews*, 123 Mich. 56 (81 N. W. Rep. 918). Cal. Code Civ. Proc., § 702, as amended by Stat. 1897, p. 41, extending the time for redemption, has no application to a sale under the foreclosure of a mortgage executed prior to the enactment of the statute. *Savings Bank of San Diego Co. v. Barrett*, 126 Cal. 413 (58 Pac. Rep. 914).

**Sec. 716. Procedure to effect redemption.** A guardian who has been discharged from his trust on account of his ward becoming of age is not a necessary party to an action to redeem from a sale made under a deed of trust previously given to him as guardian to secure a loan from his ward's estate. *Staples v. Shackelford*, 150 Mo. 471 (51 S. W. Rep. 1032). Under Ariz. Laws 1889, No. 20, §§ 19-23, a redemption can be made only by the payment of the redemption money "to the purchaser or for him to the officer who made the sale;" and a

tender to one not authorized to receive it for the purchaser is not sufficient. *Daggs v. Wilson*, Ariz. (59 Pac. Rep. 150). Cal. Civ. Code, § 1489 applied—manner of making tender when mortgagee is absent from the state. *Swain v. Jacks*, 125 Cal. 215 (57 Pac. Rep. 989). Mo. Rev. Stat. 1889, §§ 7079, 7080 construed and applied—redemption from sale under deed of trust—notice—filing security. *Union Cent. Life Ins. Co. v. Rogers*, 155 Mo. 307 (55 S. W. Rep. 1019).

**Sec. 717. Miscellaneous notes.** Where the owner of premises assumes to redeem them as creditor under a judgment against a former owner, in law the redemption will be one by an owner, and not by a creditor, and its legal effect will be to annul the sale from which the redemption is made. *Clark v. Butts*, 78 Minn. 373 (81 N. W. Rep. 11). Minn. Gen. Stat. 1894, § 6044, in reference to the time within which subsequent creditors may redeem with respect to prior lienholders, was enacted for the benefit of parties seeking to redeem, and the party holding the rights acquired at the foreclosure sale can take no advantage of the fact that a subsequent creditor redeems within the time open to a prior lienholder. *Connecticut Mut. Life Ins. Co. v. King*, 80 Minn. 76 (82 N. W. Rep. 1103). Ia. Code 1873, § 3102 construed and applied—right of owner to possession during year for redemption. *Heins v. Tamblyn*, 110 Ia. 478 (81 N. W. Rep. 698).

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## REFORMATION

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### EPITOME OF CASES.

**Sec. 718. What instruments may be reformed and when equity will reform them.** A lease may be reformed. *Green v. Dempster Mill Mfg. Co.*, Ia. (82 N. W. Rep. 483). A voluntary deed in the nature of a testamentary gift executed by a father to his son, without the latter's knowledge, cannot be reformed after the grantor's

death as against his heirs so as to correct a mistake by reason of which the deed fails to describe the land intended. *Wiley v. Hodge*, 104 Wis. 81 (80 N. W. Rep. 75; 76 Am. St. Rep. 852). A mistake in drafting a foreclosure judgment whereby it fails to conform to the judgment pronounced, in omitting a judgment for any deficiency, may be corrected on motion in the court where the mistake occurred, or on appeal, in the absence of equities rendering such correction unjust. *Packard v. Kinzie Ave. Heights Co.*, 105 Wis. 323 (81 N. W. Rep. 488). The principle of this case is applied and followed in *Bostwick v. Van Vleck*, 106 Wis. 387 (82 N. W. Rep. 302). A deed of a married woman void on account of defects in its execution, insufficient description, or her incapacity to execute it, cannot be corrected by proceedings in equity, though she received and retains the consideration therefor. *McReynolds v. Grubb*, 150 Mo. 352 (51 S. W. Rep. 822; 73 Am. St. Rep. 448). To authorize the reformation of a deed on account of a mistake, such mistake should be mutual. *Center Creek Water & Irr. Co. v. Lindsay*, 21 Utah, 192 (60 Pac. Rep. 559). Where, by mistake, land not belonging to him is included in a vendor's title bond, he may have a reformation of the bond so as to exclude such land therefrom. *Johnson v. Phillips*, Tenn. (51 S. W. Rep. 990). Where a party is misled by the fraudulent misrepresentation of the other party, and caused, by confidence in such person and his representations, to sign an instrument without reading it, he is not guilty of such negligence as will deprive him of the right to the reformation. *Conn v. Hagen*, 93 Tex. 334 (55 S. W. Rep. 323). The fact that the attorney general of a state approved a deed to it which was defective because it did not include all that was intended by the parties, although he had knowledge of such intentions, will not prevent a reformation of the deed in an action by the state. *State v. Lorenz*, 22 Wash. 289 (60 Pac. Rep. 644). For note on "Reformation of deed or incumbrance as against homestead claimants," see 77 Am. St. Rep. 804-806.

**Sec. 719. Reformation of mistakes in description.** A deed describing more property than the vendor owned may be reformed so as to include only that property which

he had a right to convey, where it appears that the mistake was mutual, the parties to the contract having in contemplation only that property which the vendor actually owned, *Jordan v. Walters*, 1a. (80 N. W. Rep. 530); but a mistake in a description will not be corrected as against an innocent third party without notice or without knowledge of facts and circumstances sufficient to put him upon inquiry, which, if pursued with diligence, would lead to notice of the mistake, *Barton v. Mayers*, 183 Ill. 360 (55 N. E. Rep. 884). For particular case illustrating the right to reform an erroneous description in a conveyance, see *Davis v. Benedict*, 122 Mich. 657 (81 N. W. Rep. 576).

**Sec. 720. Parties and complaint in actions for reformation.** In an action to reform a mistake in a deed all the parties to the deed who are affected immediately or consequentially by the mistake should be made parties. *Center Creek Water & Irr. Co. v. Lindsay*, 21 Utah, 192 (60 Pac. Rep. 559). No reformation of a deed can be had, where the complaint asking for such reformation is uncertain in description and amount of property claimed. *Center Creek Water & Irr. Co. v. Lindsay*, 21 Utah, 192 (60 Pac. Rep. 559). A complaint in an action to reform a description clearly must set forth the land which was intended to be conveyed and in what respect the deed should be reformed. *Kilgore v. Redmill*, 121 Ala. 485 (25 So. Rep. 766). A complaint to reform a deed for mistake in the description is sufficient where it sets out both the true and false descriptions; and where the reformation is sought on the ground of mutual mistake and not on account of fraud, the relation of trust and confidence between the parties need not be alleged. *Sellwood v. Henneman*, 36 Or. 575 (60 Pac. Rep. 12).

**Sec. 721. Proof required in actions for reformation.** To warrant a decree reforming a written instrument on account of a mistake, the mistake must be made out in a clear and decisive manner, and to the entire satisfaction of the court; and especially must the proofs be clear and convincing when the mistake is denied in the answer. *Searles v. Churchill*, 69 N. H. 530 (43 Atl. Rep. 184). The court say: "The reason of the rule is that 'the burden rests upon the moving party of overcoming the strong presumption

arising from the terms of a written instrument. If the proofs were doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.' *Howland v. Blake*, 97 U. S. 624, 626; *Insurance Co. v. Nelson*, 103 U. S. 544, 548; 1 Story Eq. Jur. §§ 152, 157; Bisp. Eq. §§ 469, 470; *Lyman's Adm'rs v. Little*, 15 Vt. 576, 592; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 317; *Coles v. Browne*, 10 Paige, 526, 534; *Gillespie v. Moon*, 2 Johns. Ch. 599, 600 (7 Am. Dec. 559); *Lyman Insurance Co.*, 2 Johns. Ch. 631." The same is held in *Duecker v. Goeres*, 104 Wis. 29 (80 N. W. Rep. 91); *Kilgore v. Redmill*, 121 Ala. 485 (25 So. Rep. 766); *Webb v. Nease*, 66 Ark. 155 (49 S. W. Rep. 1081). The deed of a grantor conveying a life estate will not be reformed so as to convey a fee simple, on the ground of mistake, except upon very clear and satisfactory evidence of the alleged mistake. *Seeley v. Baldwin*, 185 Ill. 211 (56 N. E. Rep. 1075). To authorize the reformation of a deed so as to include additional land claimed to have been omitted by mistake, the mistake must be proved by clear and satisfactory evidence. See opinion for particular evidence held insufficient. *Rexroat v. Vaughn*, 181 Ill. 167 (54 N. E. Rep. 917). For particular cases in which the evidence was held sufficient to warrant reformation, see *Kyner v. Boll*, 182 Ill. 171 (54 N. E. Rep. 925); *Merchant v. Pielke*, 9 N. Dak. 182 (82 N. W. Rep. 878); *Cook v. Liston*, 192 Pa. St. 19 (43 Atl. Rep. 389).

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## RENTS

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### EPITOME OF CASES.

**Sec. 722. Right to rents—Miscellaneous notes.** The right to recover rent which has accrued under a lease and to enforce a lien against personal property given by the lease to secure its payment, may be enforced by a third

party by proof of the transfer of such debt to him, without proof of an assignment of the lease. *Ramsey v. Johnson*, 8 Wyo. 476 (58 Pac. Rep. 755; 80 Am. St. Rep. 948). Under Ky. Stat., § 2138, a widow is entitled to one-third of the rents and profits of her husband's dowable real estate until dower is assigned, although she may have joined with him in a mortgage on the land, unless such rents have been sequestered for the benefit of the mortgagee, under Civ. Code Prac., § 299. *Mayfield v. Wright*, Ky. (54 S. W. Rep. 864; 21 Ky. Law Rep. 1255). Under Cal. Code Civ. Proc., § 707, a purchaser of real property at a sheriff's sale is entitled to the rents thereof from the time of the purchase to the time of redemption. *Yndart v. Den*, 125 Cal. 85 (57 Pac. Rep. 761).

**Sec. 723. Right to rents—Mortgagor and mortgagee.**

A mortgagor of real estate ordinarily is entitled to possession thereof until confirmation of foreclosure sale, and by reason thereof has a proprietary interest in the rents and profits, which passes to the purchaser of his interest at an execution sale. *Clark v. Missouri, K. & T. Trust Co.*, 59 Neb. 53 (80 N. W. Rep. 257). A mortgagee who bid in the property on foreclosure for the full amount of his judgment and costs, and receipted therefor, is not entitled to rents which accrued and were paid to a receiver during the year for redemption. *Tosetti Brewing Co. v. Goebel*, 23 Ind. App. 99 (54 N. E. Rep. 813). Unless the mortgage expressly covers the rents of the mortgaged land, the mortgagee is not entitled to them, but the mortgagor may collect and use them as he sees fit until the appointment of a receiver upon a proper showing. *St. Louis Nat. Bank v. Field*, 156 Mo. 306 (56 S. W. Rep. 1095). In Maine, where the doctrine prevails that a mortgage conveys the legal title, the right of the mortgagor to an account of the rents and profits received by the mortgagee is purely and exclusively of equitable cognizance; and where a mortgagor redeems from one in possession under the mortgage without enforcing such an accounting, his right to it is extinguished. And this rule is not changed by Rev. Stat., ch. 90, § 2. *Wilcox v. Cheviott*, 92 Me. 239 (42 Atl. Rep. 403). For particular case as to the rights of mortgagor

and mortgagee to rents, see *First Nat. Bank v. Gillam*, 123 Mich. 112 (81 N. W. Rep. 979).

**Sec. 724. Creation of liability to pay rent.** An appeal bond given by one against whom a judgment in ejectment has been entered, to answer all damages and costs, authorizes recovery for use and detention of the property pending appeal. In *re Gleeson's Estate*, 192 Pa. St. 279 (43 Atl. Rep. 1032; 73 Am. St. Rep. 808). One taking and holding possession under a tax deed adjudged to be invalid in a subsequent action by the true owner of the land is liable to the latter for rent. *Will v. Ritchie*, 61 Kan. 715 (60 Pac. Rep. 734). The doctrine that one who enters on premises, under an agreement or understanding that he is to be a purchaser, is not afterward liable in an action for use and occupation, has no application where the entry is made under the owner, and the agreement of sale, which is afterward rescinded, is with a mortgagee, whose title is acquired in subsequent foreclosure proceedings. *Lynch v. Pearson*, 125 Cal. 21 (57 Pac. Rep. 676).

**Sec. 725. Pleading and practice in actions for rent.** Separate suit may be brought on each installment of rent as they fall due, where a lease provides for the payment of certain sums as rent at stated intervals. *Marshall v. John Grosse Clothing Co.*, 184 Ill. 421 (56 N. E. Rep. 807; 75 Am. St. Rep. 181). Where one of two tenants in common, who have joined in the execution of a lease of the common estate to another, afterward conveys his undivided interest in the property to another to whom he assigns his interest and right in the lease, such grantee and the other cotenant may join in an action for the rent. *Bly v. Bliss*, 123 Mich. 195 (81 N. W. Rep. 1080). The right of the owner of premises wrongfully occupied by another to recover for their use and occupation, given by S. Dak. Comp. Laws, § 4601, may be asserted by him by a counterclaim in an action brought against him on an injunction bond given to restrain the plaintiff in an action from marketing grain raised on the land. *Parkinson v. Shew*, 12 S. Dak. 171 (80 N. W. Rep. 189). For particular case determining what rents were recoverable on an appeal



bond, see *Turner v. Johnson*, Ky. (50 S. W. Rep. 675; 20 Ky. Law Rep. 2009).

**Sec. 726. Defenses and counterclaims in actions for rent.** It is proper to consider the fact that the lessee has been deprived of the use of a portion of the premises on account of its appropriation for public use. *Uhler v. Cowan*, 192 Pa. St. 443 (44 Atl. Rep. 42). In an action for rent brought against a city on a lease it cannot show want of power to make the lease under a plea of non est factum. *City of Chicago v. English*, 180 Ill. 476 (54 N. E. Rep. 609). An action for rent under a lease valid on its face cannot be defended against on the ground that the lessee has covenanted to use the premises only for a liquor saloon and that they are located so that the law prohibits a granting of license to carry on such business on them, where it is not shown clearly that there is no means by which such business can be carried on legally on the premises or that the lessor intended to violate the law. *Shedlinsky v. Budweiser Brewing Co.*, 163 N. Y. 437 (57 N. E. Rep. 620). As to the statute of limitations as a defense to an action for use and occupancy and sufficiency of a plea thereof, see *Atkinson v. Winters*, 47 W. Va. 226 (34 S. E. Rep. 834). Particular evidence held insufficient to show that a lessee was released from his obligation to pay rent by the substitution of another in his place, to the acceptance of the lessor. *Detroit Pharmacal Co. v. Burt*, Mich. (82 N. W. Rep. 893). Where a landlord fails to perform his covenant to make repairs the tenant may recoup damages to the extent the stipulated rent was increased in consideration of such agreement. *Deuster v. Mittag*, 105 Wis. 459 (81 N. W. Rep. 643). For particular case in which it is held that a set off ought not to be allowed in an action for ground rent, see *Leibert v. Heitz*, 193 Pa. St. 590 (44 Atl. Rep. 915).

**Sec. 727. Evidence admissible in actions for rent—Proof of character of inmates and reputation of house to show that it was leased for immoral purpose.** In an action against a county to recover rent for buildings occupied by it as a court house, parol proof is admissible to show the giving of such notice as entitled it to vacate the premises

upon the lessor's failure to make repairs necessary to render them habitable, under S. Dak. Comp. Laws, §§ 3737, 3738. *Prior v. Sanborn Co.*, 12 S. Dak. 86 (80 N. W. Rep. 169). In action on an obligation given by one to pay to another the value of the use and occupation of certain real property during a particular period, evidence showing what the property actually rented for during such period is admissible, and may be considered by the jury, although it is not controlling as to the rental value. *Richardson v.* of the legal title or any one succeeding to his title with terminating particular questions as to the admissibility of evidence, see *Blackman v. Kessler*, 110 Ia. 140 (81 N. W. Rep. 185); *Stevens v. Beardsley*, 122 Mich. 671 (81 N. W. Rep. 921).

Evidence of the character of the inmates and frequenters of a house and of its reputation as being a house of ill fame is admissible to establish a defense to an action for the recovery of rental for such property based on a claim that the lessor leased it for the purpose of conducting a house of prostitution and assignation. *Demartini v. Anderson*, 127 Cal. 33 (59 Pac. Rep. 207). The court say: "As to the evidence of the characters of the inmates and frequenters of the house, the cases seem to all concur in holding it admissible. In § 1452 of 2 Whart. Cr. Law, the author, although he somewhat questions the rule that the bad reputation of the house may be shown, says: 'But, however this may be, it is settled that the bad reputations of the persons visiting the house may be put in evidence;' and, as the current of authorities is all that way, the question need not be further discussed.

Whether or not the reputation of the house itself as one of ill fame may be shown is a question about which the cases are somewhat conflicting; but we think that the weight of authority, and the better reason, support the affirmative of the proposition. It has been so held in a large number of states, and the following are some of the cases which so hold: *Sylvester v. State*, 42 Tex. 496; *Morris v. State*, 38 Tex. 603; *Allen v. State*, 15 Tex. App. 321; *State v. McDowell*, Dud. 346; *King v. State*, 17 Fla. 183; *O'Brien v. People*, 28 Mich. 213; *Betts v. State*, 93 Ind. 375; *Graeter v. State*, 105 Ind. 271 (4 N. E. Rep. 461); *State v. Brunnell*, 29 Wis. 435; *State v. Smith*, 29 Minn.

193 (12 N. W. Rep. 524) ; Territory v. Bowen, 2 Ida. 607 (23 Pac. Rep. 82) ; Drake v. State, 14 Neb. 535 (17 N. W. Rep. 117) ; Cadwell v. State, 17 Conn. 467 ; Com. v. Kimball, 7 Gray, 328. See, also, Moore, Cr. Law, par. 1072, and cases there cited, to support the statement in the text that 'a house of ill fame may be proved to be such by direct evidence, or by reputation, or by circumstances,—as that the inmates were reputed to be prostitutes.' We are much more impressed with the reasoning and consistency of the cases which hold that evidence of the reputation of a house of prostitution is admissible than with the reasoning and consistency of those cases which hold differently ; for the latter, while excluding evidence of the reputation of the house, permit evidence of the reputation of the inmates of the house for the purpose of showing that it is a house of prostitution, and this seems to be a distinction without much difference. Nearly all the cases to which we have been referred by counsel on both sides were criminal cases, where parties were being criminally prosecuted for either keeping houses of prostitution or leasing them for that purpose ; but, if the rule as above stated applies to a criminal prosecution where a man's liberty is at stake, it certainly applies with more force to a mere civil case, where nothing is involved except property."

**Sec. 728. Collection of rent by attachment or distress.**

An order permitting a lessor to distrain property in possession of the lessee's receiver should not be passed without notice to the latter. L. A. Thompson Scenic Ry. Co. v. Young, 90 Md. 278 (44 Atl. Rep. 1024). Ky. Stat., § 2302 construed and applied—particular facts held to show reasonable ground for attachment. Ward v. Grigsby, Ky. (55 S. W. Rep. 436) ; O'Bryan v. Shipp, Ky. (53 S. W. Rep. 1034 ; 21 Ky. Law Rep. 1068). Md. Code, art. 53, §§ 8, 9 construed and applied—necessity of landlord's affidavit to account annexed to distress warrant. State v. Timmons, 90 Md. 10 (44 Atl. Rep. 1003 ; 78 Am. St. Rep. 417). For particular case as to when a landlord is entitled to an attachment for the collection of rent, see Hilman v. Brigham, 110 Ia. 220 (81 N. W. Rep. 451).

# RESULTING TRUSTS

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## EPITOME OF CASES.

**Sec. 729. General principles.** A purchaser of property from one holding it subject to a resulting trust in favor of a third party, with knowledge of such trust, takes subject to it. *Holmes v. Holmes*, 106 Ga. 858 (33 S. E. Rep. 216). A resulting trust may be established by parol evidence, *Thompson v. Thompson*, Tenn. (54 S. W. Rep. 145); but the evidence must be so clear and certain as to leave no well founded doubt upon the subject; a mere preponderance of evidence is not sufficient, *Rice v. Rigley*, Ida. (61 Pac. Rep. 290). Citing, *Johnson v. Quarles*, 46 Mo. 423; *Ringo v. Richardson*, 53 Mo. 385; *Barbour v. Barbour*, 51 N. J. Eq. 271 (29 Atl. Rep. 148); *Association v. Brewster*, 51 Tex. 263; 2. Pom. Eq. Jur. § 1040; *Reynolds v. Caldwell*, 80 Ala. 232. To the same effect, see *Curd v. Brown*, 148 Mo. 82 (49 S. W. Rep. 990); *Mulock v. Mulock*, 156 Mo. 431 (57 S. W. Rep. 122).

**Sec. 730. Purchase with trust funds or in violation of trust relation.** A guardian taking the legal title to land purchased with the funds of his ward holds the same charged with a trust in favor of the latter. *Hill v. True*, 104 Wis. 294 (80 N. W. Rep. 462). Where a trustee applies trust funds to the discharge of mortgages on property subject to which she holds a lien on such property, to which she afterward acquires title and sells the same, there is a resulting trust in the proceeds of the sale. *Green v. Green*, 56 S. C. 193 (34 S. E. Rep. 249; 46 L. R. A. 525). An attorney bidding in property of his client at an execution sale thereof for the latter's benefit, holds the property in trust for him. *Holmes v. Holmes*, 106 Ga. 858 (33 S. E. Rep. 216). A vendor of land who has notice that the purchase money paid him by his vendee was taken

out of a trust fund does not thereby become liable to the cestui que trust, as he has a right to assume that the money was taken properly from the trust fund and was to be accounted for. *Royalty v. Shirley*, Ky. (53 S. W. Rep. 1044; 21 Ky. Law Rep. 1015).

**Sec. 731. Trusts arising out of fraud or violation of contract.** A parol agreement whereby one promises to sell another an interest in land upon tender within a given time of a specified amount, does not create a resulting trust in favor of the party to whom such promise is made, merely because, on the faith thereof, he abandons pending negotiations between himself and the owner of the land, and consents that the person making the promise himself shall purchase the land and take title thereto in his own name. *Lyons v. Bass*, 108 Ga. 573 (34 S. E. Rep. 721). In Rhode Island it is held that resulting trust in lands purchased by one for himself cannot arise on account of his previous oral agreement to buy them for another, there being no consideration for the agreement, *Whiting v. Dyer*, 21 R. I. 278 (43 Atl. Rep. 181); but a constructive trust arises upon one purchasing land taking title thereto in his own name in violation of an express oral contract on his part to procure the title for another, where the parties occupy a confidential relation, and at the time of the purchase the trustee declared that he was acting for the cestui que trust. *Thompson v. Thompson*, Tenn. (54 S. W. Rep. 145), collating and reviewing authorities. A surety who takes from his principal a conveyance of land, the value of which exceeds the debt for which he has become liable, under an express promise to reconvey when his liability has been terminated, and after having sold enough of the land to pay the debt, refuses to reconvey according to the agreement, becomes a trustee as to the remainder of the land for his grantor or his successors in title. *Goodwin v. McMinn*, 193 Pa. St. 646 (44 Atl. Rep. 1094; 74 Am. St. Rep. 703). But in Illinois a resulting trust in favor of a grantor cannot be predicated upon a parol agreement of his grantee to reconvey the land when the grantor shall have paid the incumbrances thereon. *Williams v. Williams*, 180 Ill. 361 (54 N. E. Rep. 229). Where one, who has agreed with three others that they

shall jointly acquire an oil lease of a certain tract of land in which they shall share equally, afterward takes the lease in his own name and, by fraudulent representations, induces one of the parties to accept less than a one-fourth interest therein, the party thus defrauded, upon discovery of the fraud, may have the other declared a trustee as to the interest which he has retained which he should have conveyed to the other parties in the enterprise. *Potts v. Fitch*, 47 W. Va. 63 (34 S. E. Rep. 959).

**Sec. 732. Trusts arising from the payment of purchase money.** A resulting trust on account of the payment of purchase money can arise only where the party claiming the benefit of the trust has furnished the consideration money or some aliquot part thereof as a part of the original transaction, and he must have occupied such position then as to entitle him to be substituted for the grantee. *Pickler v. Pickler*, 180 Ill. 168 (54 N. E. Rep. 311); *Devine v. Devine*, 180 Ill. 447 (54 N. E. Rep. 336). The payment which is to raise the trust must be made at the very instant the title is taken by the alleged trustee, as no subsequent payment, or even oral agreement for such trust, will raise it. *Harris v. Elliott*, 45 W. Va. 245 (32 S. E. Rep. 176). When two or more persons together advance the price, and the title is taken in the name of one of them, a trust will result in favor of the other, with respect to a share of the property, in proportion to the consideration advanced or paid by him. *Sanders v. Steele*, 124 Ala. 415 (26 So. Rep. 882). A trust may be enforced in such case, under Ky. Stat., § 2353, where the title is so taken without the consent of the other copurchaser. *Webb v. Foley*, Ky. (49 S. W. Rep. 40; 20 Ky. Law Rep. 1207). One paying a part of the purchase price of land which is conveyed to another may maintain an action to enforce a trust therein to the extent of the purchase price paid against the holder of the legal title or any one succeeding to his title with notice of the trust. *South San Bernardino L. & Imp. Co. v. San Bernardino Nat. Bank*, 127 Cal. 245 (59 Pac. Rep. 699). Where one partner purchases land with partnership funds and has it conveyed to himself, a trust results in favor of the other partner to the extent of his interest in

such funds. *Crone v. Crone*, 180 Ill. 599 (54 N. E. Rep. 605). A widow of a deceased vendee who pays the balance due on his contract to purchase lands out of funds belonging to his estate and takes a deed for the land in her own name, holds the land in trust for his heirs. *Zunkel v. Colson*, 109 Ia. 695 (81 N. W. Rep. 175). A trust resulting from the payment of purchase money may be established by parol evidence. *Galbraith v. Galbraith*, 190 Pa. St. 225 (42 Atl. Rep. 683); *Corey v. Morrill*, 71 Vt. 51 (42 Atl. Rep. 976); *Branstetter v. Mann*, 100 Ida. 57 (57 Pac. Rep. 433); *Holmes v. Holmes*, 106 Ga. 858 (33 S. E. Rep. 216); *Sanders v. Steele*, 124 Ala. 415 (26 So. Rep. 882); *Webb v. Foley*, 100 Ky. 40 (49 S. W. Rep. 40); 20 Ky. Law Rep. 1207). But the evidence must be clear, strong, unequivocal, unmistakable and must establish the fact of payment by the alleged beneficiary beyond a doubt. *Pickler v. Pickler*, 180 Ill. 168 (54 N. E. Rep. 311); *Devine v. Devine*, 180 Ill. 447 (54 N. E. Rep. 336). For particular evidence held sufficient to establish a resulting trust on account of the payment of purchase money, see *Galbraith v. Galbraith*, 190 Pa. St. 225 (42 Atl. Rep. 683); *Oregon Lumber Co. v. Jones*, 36 Or. 80 (58 Pac. Rep. 769); *Sanders v. Steele*, 124 Ala. 415 (26 So. Rep. 882); *James v. Groff*, 157 Mo. 402 (57 S. W. Rep. 1081); *Costa v. Silva*, 127 Cal. 351 (59 Pac. Rep. 695).

In Massachusetts it is held that a resulting trust cannot be enforced in favor of one paying a part of the consideration for land which he caused to be conveyed to another who paid the balance of the consideration, although there was a parol agreement between them that the grantee should hold the title for their benefit. *Dudley v. Dudley*, 176 Mass. 34 (56 N. E. Rep. 1011). Under the statute of Kentucky no resulting trust arises in favor of one paying the purchase price for land which is conveyed to another, in the absence of fraud or mistake. *Curd v. Curd's Adm'r*, 100 Ky. 53 (53 S. W. Rep. 522); 21 Ky. Law Rep. 919). The defense against enforcement of a resulting trust that the title was taken as it was for the purpose of defrauding creditors of the beneficiary cannot be made unless pleaded. *Crone v. Crone*, 180 Ill. 599 (54 N. E. Rep. 605). Where it appears clearly that, in

paying for land by one with conveyance to another, the party paying intended to make a gift or confer a benefit, no resulting trust arises in his favor. *Harris v. Elliott*, 45 W. Va. 245 (32 S. E. Rep. 176). Where the holder of the legal title to property, an undivided one-half interest in which he holds in trust for a third person on account of the payment of a part of the purchase price, recovers a judgment against a city for damages to the property, he holds the proceeds of such judgment subject to a like trust. *Sanders v. Steele*, 124 Ala. 415 (26 So. Rep. 882).

**Sec. 733. Trusts arising from the payment of purchase money—Conveyance to husband or wife.** A trust results in favor of a wife and her children by her husband purchasing land with her separate estate and taking a conveyance thereof in his own name, under an agreement to hold it for her and her children. *Arnold v. Harris*, Tenn. (52 S. W. Rep. 715). A husband who takes a deed to land purchased in part with funds belonging to his wife which he has received from her under an agreement to invest in land with the understanding that she is to have an interest in the land to the extent of the funds furnished by her, holds the land charged with a resulting trust in her favor to that extent. *Bible v. Marshall*, 103 Tenn. 324 (52 S. W. Rep. 1077). Where lands held by a husband and wife as tenants in common, each owning an undivided one-half thereof, are sold by them and a mortgage given by the purchaser to secure the unpaid purchase money is taken in the name of the husband alone by agreement of the parties, it inures to her benefit to the extent of her interest, and, when the husband receives payment of the mortgage or a conveyance of the property in satisfaction thereof, he holds as trustee for his wife, to the extent of her interest, and one taking a mortgage from him with notice of the facts holds subject to the interest of the wife. *Rike v. Nichols*, 121 Ala. 639 (25 So. Rep. 1019). A husband cannot enforce a resulting trust in lands purchased with the joint earnings of himself and wife and conveyed to her, where he is not able to show what portion of the purchase price was furnished by him. *Devine v. Devine*, 180 Ill. 447 (54 N. E. Rep. 336). The presumption that a husband paying the consideration for land



and having the deed made to his wife intends the conveyance as a gift, may be rebutted by testimony, so as to create a resulting trust in his favor. *Corey v. Morrill*, 71 Vt. 51 (42 Atl. Rep. 976); *Curd v. Brown*, 148 Mo. 82 (49 S. W. Rep. 990). For particular fact cases in which the evidence was held insufficient to establish a resulting trust in favor of a husband or wife, on account of conveyance taken in the name of the other, see *Pickler v. Pickler*, 180 Ill. 168 (54 N. E. Rep. 311); *Rotter v. Scott*, 111 Ia. 31 (82 N. W. Rep. 437); *Curd v. Brown*, 148 Mo. 82 (49 S. W. Rep. 990).

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## RIGHT OF WAY

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### EPITOME OF CASES.

**Sec. 734. Acquiescence in use of land for railroad right of way.** A landowner cannot maintain ejectment or trespass when he has consented to the entry upon his land, and the construction of the road, or knew of it, and made no objections, and permitted the road to be used for years without making claim for compensation. *Rutland R. Co. v. Chaffee*, 71 Vt. 84 (42 Atl. Rep. 984). The fact that a landowner, on account of the acquiescence of the use of his land by a railroad company for a right of way, is estopped from maintaining ejectment against the company does not deprive him of his right to recover damages for the taking of the land and in such an action he may recover damages for injury to land not taken, though he does not aver or prove that the land actually taken has any value. *Trustees Common-School Dist. No. 14 v. Nashville, C. & St. L. R. Co.*, Ky. (56 S. W. Rep. 990). A landowner who received notice of the condemnation of his land for a water pipe line, after the laying of such pipe line and the assessment of his damages, cannot have an injunction for the removal of the pipes on the ground of the abuse of the discretion in the location of the route. *Biddle v. Wayne*

Waterworks Co., 190 Pa. St. 94 (42 Atl. Rep. 380). Remainder men who have been guilty of no fraud or other act inducing a railway company to enter upon, occupy and construct its road upon their land in pursuance of a parol sale from the life tenant, are not estopped to recover the land after such construction and operation of the road. *Southern Ry. Co. v. Standiford*, Ky. (53 S. W. Rep. 668; 21 Ky. Law Rep. 1023).

**Sec. 735. Covenants and limitations in conveyance of right of way.** A covenant by the grantor in a deed of a railroad right of way to fence the right of way or not to hold the railroad responsible for any damage done to stock, is held to be personal, does not run with the land, and does not relieve the company from liability for injury to stock of a tenant or a successor in interest of the grantor. *Brown v. Southern Pac. R. Co.*, 36 Or. 128 (58 Pac. Rep. 1104; 47 L. R. A. 409; 78 Am. St. Rep. 761). But a covenant in a deed of land for a railroad right of way, that certain trains shall be run on the road to be built thereon, which is the chief consideration of the conveyance, is a covenant running with the land, on which an action may be maintained against a subsequent purchaser of the railroad who fails to run such trains, notwithstanding the fact that the covenant had been broken by the original grantee before such transfer, and although the covenant does not expressly refer to assigns. *Doty v. Chattanooga Union Ry. Co.*, 103 Tenn. 564 (53 S. W. Rep. 944; 48 L. R. A. 160). A recital in a deed conveying land to a street railroad company for a right of way specifying that the grantee was to run its cars over the right of way a specified number of times during the day, perpetually, and a habendum clause providing that the grantee is "to hold and to have so long as the party of the second part \* \* \* uses the said right of way \* \* \* for all legitimate railroad purposes herein set forth, and no other," create a limitation upon the estate granted and not an estate upon condition, and the land reverts to the grantor immediately, without re-entry by him, in case of its abandonment by the grantee or its successor. *Atlanta Consol. St. Ry. Co. v. Jackson*, 108 Ga. 634 (34 S. E. Rep. 184).

**Sec. 736. Grants of right of way—Construction.** In the absence of fraud or mistake an unconditional deed of a right of way by a landowner to a railroad company cannot be avoided on account of the company's noncompliance with the unauthorized oral conditions upon which its agent took the deed. *Parsons v. Detroit & M. Ry Co.*, 122 Mich. 462 (81 N. W. Rep. 343). Where a railroad company's title to its right of way over platted land rests on a deed from the owner thereof after the making and recording of the plat, which deed recognizes the streets marked on the plat, such company cannot deny the easement of the public for such street crossings over its track. *Chicago, R. I. & Pac. Ry. Co. v. City of Council Bluffs*, 109 Ia. 425 (80 N. W. Rep. 564). A stipulation in a deed of a railroad right of way subjecting the grantee to the duty of building a crossing over the proposed railroad, to be used by the grantor, is a reservation and not an exception. *Knowlton v. New York, N. H. & H. R. Co.*, 72 Conn. 188 (44 Atl. Rep. 8). A grant by a landowner to a railroad company of a right of way over his land reciting a consideration of one dollar and the advantages, benefits, and conveniences resulting from the building of the road, bars him from subsequently claiming damages which properly would have been included in making an appropriation of such right of way under eminent domain, but does not preclude his recovering damages subsequently accruing to him on account of the improper construction of the railroad. *Kirk v. Kansas City, S. & G. Ry. Co.*, 51 La. Ann. 667 (25 So. Rep. 457). The principle in this case is followed and applied in the case of *Kirk v. Kansas City, S. & G. Ry. Co.*, 51 La. Ann. 664 (25 So. Rep. 463). Where, in a grant of a right of way to a railroad company, it agreed that if it found it necessary to remove or destroy certain fruit trees growing on the land it would pay for them at a reasonable price, the measure of damages in case of their destruction is the value of the trees destroyed and not the difference in the value of the land before and after their destruction. *Cooley v. Kansas City, P. & G. R. Co.*, 149 Mo. 487 (51 S. W. Rep. 101). For construction of particular conveyances of right of way, see *Long v. Louisville & N. R. Co.*, Ky. (51 S. W. Rep. 807; 21 Ky. Law Rep. 463); *Jasper*

Co. Elec. Ry Co. v. Curtis, 154 Mo. 10 (55 S. W. Rep. 222). For construction of particular deeds of right of way in respect to covenants as to crossings, see *Elizabethtown, L. & B. S. R. Co. v. Wright's Adm'r*, Ky. (50 S. W. Rep. 1105; 21 Ky. Law Rep. 128); *Elizabethtown, L. & B. S. R. Co. v. Killen*, Ky. (50 S. W. Rep. 1108; 21 Ky. Law Rep. 122); *Elizabethtown, L. & B. S. R. Co. v. Ford*, Ky. (50 S. W. Rep. 1112; 21 Ky. Law Rep. 129); *Mills v. Chicago & N. W. Ry. Co.*, 103 Wis. 192 (79 N. W. Rep. 245).

**Sec. 737. Railroad right of way—Acquisition or loss by adverse possession.** A railway company, by user for the prescriptive period, may acquire the right to maintain its tracks longitudinally in a city street, as against a municipality having power to grant it this privilege. *Town of Newcastle v. Lake Erie & W. R. Co.*, 155 Ind. 18 (57 N. E. Rep. 516). Appropriation and use of land for a railroad right of way without authority constitutes adverse possession, when the owner has notice of it, and a railroad company thus may acquire title to a right of way. *Memphis & L. R. R. Co. v. Organ*, 67 Ark. 84 (55 S. W. Rep. 952). In such a case if the character and extent of the possession and the acts of the company, considered with reference to the nature of railroads, are such as clearly to indicate an adverse claim to a right of way of a certain width, a right of way to that extent may be acquired by prescription, although it is not all occupied by track or any other structures. *Waggoner v. Wabash R. Co.*, 185 Ill. 154 (56 N. E. Rep. 1050). The building of corn cribs and other structures upon the right of way of a railroad company, whether by the consent of the company or the owner of the adjoining land, does not amount to such adverse possession by others as to defeat the right of the company under an agreement with the original owner of the land constituting the right of way for its purchase or stop the running of the statute of limitations in its favor. *Waggoner v. Wabash R. Co.*, 185 Ill. 154 (56 N. E. Rep. 1050).

**Sec. 738. Use of railroad right of way—Erection of hotels and eating houses.** A railroad company to which

a right of way has been conveyed "for all legitimate railroad, depot and warehouse purposes" may erect a hotel or eating house thereon, where such a building is reasonably necessary for the accommodation of its employees and the traveling public; but a complaint to enjoin the erection of such a building which alleges that it does not add to the comfort, convenience, or safety of the railway passengers, but is for the accommodation of the general public, will be held sufficient on demurrer. *Abraham v. Oregon & C. R. Co.*, 37 Or. 495 (60 Pac. Rep. 899). The court say: "It is claimed, however, on behalf of the plaintiff, that the hotel is not a legitimate or proper railroad purpose, because it is used for the accommodation of the general public, and not for the passengers and employes of the railroad company. The erection and maintenance by railway companies of hotels or eating stations at suitable and convenient places along their roads for the use and accommodation of their employes and passengers is not only a legitimate and proper railroad use, but almost, if not quite, a necessity, in many instances, of modern railway travel. A railway company has an undoubted right to use its property in any way the exigencies of its business or the convenience or accommodation of its passengers may require or suggest. *Gudger v. Railway Co.*, 106 N. C. 481 (11 S. E. Rep. 515); *Telegraph Co. v. Rich.* 19 Kan. 517 (27 Am. Rep. 159); *Gurney v. Elevator Co.*, 63 Minn. 70 (65 N. W. Rep. 136; 30 L. R. A. 534); *Railroad Co. v. Wathen*, 17 Ill. App. 582. And, in cases where hotels or eating houses appear to be reasonably necessary for the convenience of its employes and passengers, their maintenance is a legitimate railroad purpose. But an eating house or hotel kept for the accommodation of the general public, and not as an incident to the operation and management of the railway, cannot be so considered. As to whether a given hotel or eating house is maintained for railroad purposes is therefore largely a mixed question of law and fact, to be determined from the circumstances of each particular case. The question as to when and under what circumstances a hotel is a necessary or legitimate railroad use or purpose is quite fully considered in *Milwaukee & St. Paul Ry. Co. v. Board of Sup'rs of Crawford Co.*, 29 Wis. 116; *Milwaukee & St. Paul Ry. Co. v.*

City of Milwaukee, 34 Wis. 271; Chicago, M. & St. P. Ry. Co. v. Board of Sup'rs of Crawford Co., 48 Wis. 666 (5 N. W. Rep. 3); and, with the doctrine of these cases, we are of the opinion that, under the allegations of the complaint, the operation of the hotel in question cannot be held, as a matter of law, to be a 'legitimate railroad purpose,' and within the terms of the grant from the plaintiff, because it is alleged that it is not necessary, and does not add to the comfort, convenience, or safety of the railway passengers, but is for the accommodation of the general public. It seems to us, therefore, the demurrer should be overruled and the case tried upon its merits, so that the court, aided by the testimony, can determine whether the hotel is in fact a legitimate railroad purpose."

**Sec. 739. Use of railroad right of way—Grant of exclusive privileges to hackmen.** Railway companies cannot grant special privileges beyond the limits of their lands and make a contract with one which gives him the right to carry passengers from their depots beyond their own lines, and exclude others from such privilege of carriage. *Pennsylvania Co. v. City of Chicago*, 181 Ill. 289 (54 N. E. Rep. 825). The court say: "If such companies control the transportation of passengers and merchandise beyond their own lines, such power might be exercised solely for their own benefit and not for that of the public. They cannot make a rule under which certain persons are allowed to occupy the streets or control travel, and exclude others therefrom, regardless of any wrongdoing or misconduct on the part of the persons so excluded. An attempt to exercise a power of that character would be unreasonable and unauthorized under the law. *Railway Co. v. Langlois*, 9 Mont. 419 (24 Pac. Rep. 209; 8 L. R. A. 753), and authorities cited; *Railroad Co. v. Tripp*, 147 Mass. 35 (17 N. E. Rep. 89; 9 Am. St. Rep. 661); *Summit v. State*, 8 Lea, 413.

*Bus Co. v. Sootsma*, 84 Mich. 194 (47 N. W. Rep. 667; 22 Am. St. Rep. 693; 10 L. R. A. 819), was a case where a construction company operating a railroad had leased to the plaintiff a piece of land used for depot purposes in the city of Kalamazoo, to be used by it for carriage and hack-stand purposes only. Notices of this lease

were posted up, and the superintendent of the railroad company also notified others that the property was for the exclusive use of the lessee company. The defendant placed his hack on the ground, and, on being notified to leave, refused to do so, and remained there until an incoming train, when he procured a passenger and drove away with him, whereupon the hack company sued in trespass. The court say: 'The granting of this exclusive privilege to occupy this favored spot of ground, and one used theretofore customarily by all hackmen and busmen, to the plaintiff, was a discrimination against the defendant, as well as all other hackmen not in the employ or service of the plaintiff, thus giving to the plaintiff a monopoly of the railroad company's grounds for the standing of hacks and busses, and the soliciting of passengers therefor, \* \* \* and is contrary to the provision of the statute that "all railroad corporations shall grant equal facilities for the transportation of passengers and freight to all persons, companies or corporations."' The court further say: 'This statute evidently does not relate entirely to the mere carriage on cars of the road. To be effective, it must be construed to include, also, not only the receiving of such passengers and freight at its depots, but as well the receiving of them by other persons, companies or corporations at the point upon its road where the carriage ends. The access to its grounds must be free and equal to all, whether it be to take passage or leave the trains. No railroad company, under this statute, would be permitted to give to one hack or bus company exclusive access to its depots in the carriage of passengers or freight to its trains. Nor can it any more properly give such exclusive or better privilege to such company taking passengers or freight from its trains to be transported from them elsewhere. But, independently of the statute, the plaintiff could not recover in this case. A railroad company can make all needful reasonable rules and regulations concerning the use of its depots and grounds, and can exclude all persons therefrom who have no business with the railroad or passengers going to and coming from the trains or depots, and it probably can prohibit all persons from soliciting passengers there themselves upon its premises; but it cannot arbitrarily admit

one common carrier of passengers or freight to its depot or grounds, and exclude all others, for no other reason than that it is for its own private profit or pleasure. Such rules and regulations must touch and affect all alike. It may determine the distance from its depot or track at which persons soliciting passengers may stand while on its grounds, but this determination must affect and apply to all. To permit a railroad company, upon any charge except of wrong or misconduct on the part of the person excluded, to allow one hackman or line of hacks to occupy a place upon its grounds which is denied to another, or to set apart the most favorable ground, as in this case, to one company, and to exclude the others therefrom, would be, in the language of Justice Field in *Railroad Co. v. Tripp*, 147 Mass. 43 (17 N. E. Rep. 95; 9 Am. St. Rep. 661), "to enable a railroad corporation largely to control the transportation of passengers and merchandise beyond its own line, and to establish a monopoly not granted by its charter, which might be solely for its own benefit, and not for the benefit of the public." *Railway Co. v. Langlois*, 9 Mont. 419 (24 Pac. Rep. 209; 8 L. R. A. 753), was an action for an injunction brought by the railway company against the defendant, in which the bill, answer, and stipulated facts showed that the railroad company had contracted with Lovell Bros., by which contract they were to carry the mail for the railway company from its station to the postoffice, in consideration of which they were to have the exclusive use of certain grounds belonging to the complainant, which it had enclosed. The defendant had insisted in driving his wagons and busses onto said lands, and leaving them standing on the ground, the exclusive use of which had been granted to said Lovell Bros. The court, on hearing, dissolved the temporary injunction granted, and based their reason for so doing on the ground that to permit the injunction to stand, restraining other cab drivers than Lovell Bros., to whom the exclusive use had been given, from using the depot grounds, would aid in causing a monopoly, destroy just competition, and cause thereby a hardship, not only to other cab drivers, but on the general public. The court cite *Marriott v. Railway Co.*, 1 C. B. (N. S.) 499, in which case the complainant alleged that he brought passengers to the defendant's rail-



way station, and the latter refused him access to the station grounds to deliver his passengers there, while at the same time this privilege was granted to other companies, and upon this showing the injunction was granted. *McConnell v. Pedigo*, 92 Ky. 465 (18 S. W. Rep. 15), was a case in which a contract similar to that in the case last above cited had been entered into between the railroad company and McConnell, by which an exclusive privilege was sought to be given to him in consideration that he would carry the mails for the company. The injunction sought was denied. To the same effect is the recent case of *State v. Reed*, 76 Miss. 211 (24 So. Rep. 308; 71 Am. St. Rep. 528; 43 L. R. A. 134)."

**Sec. 740. Railroads crossing streets and highways—Statutes construed.** A railroad company cannot close a highway crossing its track on the ground that it had not been dedicated to the public when the railroad acquired its right of way and that the right to cross the railroad never had been acquired by condemnation, where such highway was being used by the public at the time the railroad acquired its right of way, and the company had consented to such use for more than forty years after that time. *Louisville & N. R. Co. v. Sonne*, Ky. (53 S. W. Rep. 274; 21 Ky. Law Rep. 848). The legislature may grant authority to railroad commissioners to require the alteration of dangerous grades and crossings, and provide compensation for those who suffer consequential damages on account of such change. Conn. Laws 1884, ch. 100 construed and applied. *New Haven Steam Sawmill Co. v. City of New Haven*, 72 Conn. 276 (44 Atl. Rep. 229). Miss. Code, § 3555, which makes it the duty of a railroad company where its road is constructed so as to cross a highway, and it becomes necessary to raise or lower the highway, to make proper and easy grades in the highway, so that the railroad may be conveniently crossed, and to keep such crossing in good order, is held to apply to city streets as well as country roads. *Hamlin v. Southern Ry. Co.*, 76 Miss. 410 (25 So. Rep. 295). Mo. Rev. Stat. 1889, §§ 2609, 7925, which require railroad companies to construct crossings where the road crosses "public roads or streets now or thereafter to be opened for

public use," applies only to roads or streets that have been or may be legally established. *St. Louis & S. F. R. Co. v. Gordon*, 157 Mo. 71 (57 S. W. Rep. 742). N. Y. Laws 1890, ch. 565, § 12 construed and applied—procurement of right of way of one railroad to cross the tracks of another. *Geneva & W. Ry. Co. v. New York Cent. & H. R. R. Co.*, 163 N. Y. 228 (57 N. E. Rep. 498).

**Sec. 741. Miscellaneous notes.** Mere nonuser by a railroad company of a portion of its right of way under circumstances which do not show an intention to abandon its easement in such land does not have that effect. *Scarritt v. Kansas City, O. & S. Ry. Co.*, 148 Mo. 676 (50 S. W. Rep. 905). A railroad company is liable to an adjoining landowner for damages resulting to him from its construction of an embankment on its right of way which spreads beyond the bounds of its right of way onto the land of the adjoining owner. *Sims v. Ohio River & C. Ry. Co.*, 56 S. C. 30 (33 S. E. Rep. 746). A landowner cannot recover damages from a railroad company on account of its narrowing a passageway under one of its bridges which it had agreed to furnish to him when contracting for the right of way, where such agreement did not call for a passage of any particular width and the new passage was sufficient for the uses for which the way was intended. *Olver v. Burlington, C. R. & N. Ry. Co.*, 111 Ia. 121 (82 N. W. Rep. 609).

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## RIPARIAN OWNERS

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### EPITOME OF CASES.

**Sec. 742. Title and rights of riparian owners.** Except as abrogated by the statute, the common law rules relative to the rights of a private riparian owner are in force in Nebraska. *Slattery v. Harley*, 58 Neb. 575 (79

N. W. Rep. 151). Title to lands in New Jersey which lie between mean high and low water mark is in the state of New Jersey. An owner of lands lying adjacent to the shore, who has not acquired the state's title to the shore, in the mode prescribed by the riparian acts, is not the owner of the shore, and will not be allowed an injunction to restrain the removal of a wharf resting upon piling driven in the shore, through and over which the tides flow. *Amos v. Norcross*, 58 N. J. Eq. 256 (43 Atl. Rep. 195). Under Va. Code, § 1339, the rights and privileges of owners of land lying on bays, rivers, creeks and shores extend to low water mark, although the boundaries designated in the conveyances are to "high water mark," unless the terms of the deeds manifest a clear intention to control the operation of the statute. *Waverly Water-Front & Imp. Co. v. White*, 97 Va. 176 (33 S. E. Rep. 534; 45 L. R. A. 227; see pp. 227-242 for exhaustive note on "Title to land between high and low water mark"). A statutory right conferred upon private riparian owners to erect wharves and buildings on the banks of a river, constitutes a private right of property which cannot be taken without compensation. 7 Smith's Pa. Laws 34; Pub Laws 1835, p. 127 construed and applied. *Gumbes v. City of Philadelphia*, Pa. St. (43 Atl. Rep. 88). The legislative grant of authority to build a bridge over a stream does not give the grantee a right to take valuable riparian rights without compensation. *Ballance v. City of Peoria* 180 Ill. 29 (54 N. E. Rep. 428). The legislature, by declaring a stream navigable which in fact is not navigable, cannot deprive riparian owners of their rights to maintain water gaps across it. *Murray v. Preston*, Ky. (50 S. W. Rep. 1095; 21 Ky. Law Rep. 72). If a public street or highway exists so that its boundary line and the waters of a navigable lake meet, the riparian rights incident to the land composing the street belong to the public. In such a situation there is no zone of private right between the street and the lake, but the public right is continuous from the street to the waters of the lake and from the waters of the lake to the street. *Village of Pewaukee v. Savoy*, 103 Wis. 271 (79 N. W. Rep. 436; 50 L. R. A. 836; 74 Am. St. Rep. 859).

**Sec. 743. Title to lakes.** Where patents issued by the government conveying by different descriptions land bordering on an unmeandered lake would include an island within their extended lines, the patentees take title to the island, which will prevail against a purchaser at a subsequent sale of it by the government. *Church v. Case*, 122 Mich. 554 (81 N. W. Rep. 334). In Illinois shore owners on meandered lakes, whether navigable or nonnavigable, take title only to the water's edge, title to the bed of the lake being in the state. *Hammond v. Shepard*, 186 Ill. 235 (57 N. E. Rep. 867; 78 Am. St. Rep. 274). Upon this point, the supreme court of Wisconsin, in the case of *Rood v. Wallace*, 109 Ia. 5 (79 N. W. Rep. 449), say: "We are quite ready to assume, as a general proposition, that the title to all the lake beds in the state, especially those of navigable lakes, is in the state, and that the general government never had any control or ownership thereof. Indeed, this seems to be the almost unbroken voice of authority. *Pollard's Lessee v. Hagan*, 3 How. 212; *Withers v. Buckley*, 20 How. 92; *Shively v. Bowlby*, 152 U. S. 1 (14 Sup. Ct. Rep. 548); *Mann v. Land Co.*, 153 U. S. 273 (14 Sup. Ct. Rep. 820); *Knight v. Association*, 142 U. S. 161 (12 Sup. Ct. Rep. 258); *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387 (13 Sup. Ct. Rep. 110); *Gunter v. Geary*, 1 Cal. 463; *Hinman v. Warren*, 6 Or. 408; *Haight v. City of Keokuk*, 4 Ia. 199; *Hardin v. Jordan*, 140 U. S. 371 (11 Sup. Ct. Rep. 808, 838); *Veazie v. Moor*, 14 How. 568; *Noyes v. Collins*, 92 Ia. 566 (61 N. W. Rep. 250; 26 L. R. A. 609; 54 Am. St. Rep. 571); *Lamprey v. Metcalf*, 52 Minn. 181 (53 N. W. Rep. 1139; 18 L. R. A. 670; 38 Am. St. Rep. 541)." The title of the state to submerged lands under the waters of navigable lakes will be extended so as to include lands covered by an artificial rising of the level of the lake if such artificial condition be continued so long as to become the natural condition. *Village of Pewaukee v. Savoy*, 103 Wis. 271 (79 N. W. Rep. 436; 74 Am. St. Rep. 859; 50 L. R. A. 836; see pp. 836-846 for exhaustive note on "Rights acquired in an artificial condition of a body of water"). But where the title to the bed of a lake is not in the state, the waters thereof do not become public from the fact that the lake was increased artificially and incidentally was used by the public. *City of Albert Lea. v. Da-*

vies, 80 Minn. 101 (82 N. W. Rep. 1104). The state cannot grant the title to submerged lands under navigable waters, with the right of draining such waters. Wis. Laws 1891, ch. 202 construed and applied. *Priewe v. Wisconsin State Land & Imp. Co.*, 103 Wis. 537 (79 N. W. Rep. 780; 74 Am. St. Rep. 904). For particular case in which riparian owners are held to have acquired a prescriptive right to drain lakes on their property, see *Chase v. Middleton*, 123 Mich. 647 (82 N. W. Rep. 612).

**Sec. 744. Navigable waters—Title to lands under and rights of riparian owners.** In Illinois the title of a riparian owner along a navigable stream extends to the middle thread of the stream, subject to the public right of navigation; and a lessee from such an owner of the riparian lands will take to the middle thread of the stream unless there is something in the instrument showing a different intention of the parties. *Ballance v. City of Peoria*, 180 Ill. 29 (54 N. E. Rep. 428). The first proposition stated above is supported by *Bellefontaine Imp. Co. v. Neidringhaus*, 181 Ill. 426 (55 N. E. Rep. 184; 72 Am. St. Rep. 269). The mere fact that it is possible to use a stream for floating logs during high water, does not render it navigable where it appears that such use is impracticable on account of the water running down in a few hours. *Murray v. Preston*, Ky. (54 S. W. Rep. 1095; 21 Ky. Law Rep. 72). In Oregon any stream is navigable, on whose waters logs or timbers can be floated to market; and such a stream is not deprived of its navigable character by the fact that for a portion of the year it cannot be used for that purpose. A riparian owner upon a stream navigable only for the purpose of floating logs, has, as appurtenant to such ownership of the bank, the exclusive right to dam the stream upon such premises, provided the floating of logs by others is not obstructed thereby. *Hallock v. Suitor*, 37 Or. 9 (60 Pac. Rep. 384). A stream thirty feet wide, although not practically navigable, will be treated as a navigable stream, within the meaning of Tex. Rev. Stat., § 4147, in the sense that abutting owners acquire title to the water line only and title to the bed of the stream remains in the state. *City of Austin v. Hall*, 93 Tex. 591 (57 S. W. Rep. 563). The fact that a navigable stream or slough has not been me-

andered does not render it private property so as to entitle a riparian owner to recover the value of the use made thereof by another, but his recovery is limited to the damage, if any, done to his adjoining land and to the rents and profits of the lands used. *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542 (58 Pac. Rep. 663).

**Sec. 745. Navigable waters—Wharf rights.** In the case of *New York, N. H. & H. R. Co. v. Long*, 72 Conn. 10 (43 Atl. Rep. 559), the supreme court of Connecticut say: "A riparian proprietor whose land is bounded by a navigable stream has certain rights as such, among which, in the language of Mr. Justice Miller, are 'access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use, or for the use of the public, subject to such general rules or regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those rights may be.' *Yates v. Milwaukee*, 10 Wall. 497, 504. The right is to build a structure in the water for more convenient access to and from the channel. This structure is a wharf, pier, or landing. Its use may be confined to the owner, or shared with the public; but its use, whether public or private, has no relation to the fact of its being a legal structure. That depends on the ownership of the upland, and is in no way affected by the character of its use as a wharf. The status of the wharf as a legal structure is controlled by the ownership of the upland; the right of the owner to exclude the public from its use is controlled by other and different considerations. 'Piers or landing places, and even wharves, may be private, \* \* \* or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use; the question whether they are so, or are open to public use on payment of reasonable compensation as wharfage, depending in such cases 'upon several considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure.' *Dutton v. Strong*, 1 Black, 1, 32. But whether the wharf be public or private, the structure is legal if built in pursuance of riparian right. It cannot be abated as a

nuisance interfering with free navigation because of conflicting claims as to its use. Being a public wharf, the owner or other person may, by placing upon it buildings, or in other ways, so appropriate it to his exclusive use as to obstruct its use by the public; and these acts may constitute a public nuisance, which may be abated or restrained on application of the state, or of an individual who suffers a special or peculiar injury by this exclusion of the public from the use of the wharf. But such nuisance is not an obstruction to the free use of navigable waters. The wharf structure cannot be abated because of such nuisance, and the actual nuisance cannot be restrained at the suit of an individual whose special injury results wholly from the existence of the wharf structure, and not at all from its misuse."

The dedication of a highway along the shore of navigable waters outside a town or city, does not carry with it a right to land vessels indiscriminately on such highway, and its use as a public landing place to discharge and receive freight and passengers. *California Nav. & Imp. Co. v. Union Transp. Co.*, 126 Cal. 433 (58 Pac. Rep. 936; 46 L. R. A. 825). The court say: "Instances are numerous where highways are laid out along the shores of rivers, lakes, bays, and the ocean, both for pleasure and for general utility as highways. We know of no principle of law that would justify us in holding that the owner of the soil over which any such highway is laid out is to be deemed to have dedicated the banks or shores to the common use of the public for landing purposes by dedicating a strip of land as a highway. In the case of *Chambers v. Furry*, 1 Yeates, 167, the question arose under an alleged right of fishery to land on the Susquehanna river at a point where the public highway approached the river. The action was trespass, and the defendant justified on the ground, among others, that there was a highway laid out to the river at the point in question. The evidence showed that the highway terminated some perches distant from where the boats landed and received their freight. The court said: 'But, had it been a highway, would it have been a justification? The public would in that case have been entitled to a right of passage, but the title to the soil, the stones, the wood, or the grass growing thereon would have still continued

in the owner of the lands. The use of the ground would be dedicated to the public for particular purposes only. The books lay it down that in England the right to a bed of a navigable river is presumed to belong to the crown, and, of course, in such cases here to the commonwealth, "usque ad filum aquae"; but the right to the adjoining lands rests in the owner of the soil. No one can use them without making compensation to the respective proprietors.' The rule as held in that early case has been often since approved, and, we think, is the correct rule, except as it seems to have been modified in relation to streets in towns and cities. See *Cooper v. Smith*, 9 Serg. & R. 26; *Chess v. Manon*, 3 Watts, 219. The question was more fully considered and was elaborately discussed in the case of *Pearsall v. Post*, 20 Wend. 111, and later, on appeal to the court of errors, in *Post v. Pearsall*, 22 Wend. 425. The action was trespass for entering upon the land of plaintiff and depositing thereon a quantity of manure. The case had very full consideration both in the supreme court and in the court of errors. After reviewing the cases, including those above cited, Mr. Justice Cowen, speaking on the point before us, said: 'The amount of these cases is that roads are made to be traveled on, and not to be occupied, much less to be blocked up, by sloops and scows. If the contrary were allowed, the ferryman might derive a profit from his toll, which belongs to the owner, under a pretense of free passage. The intention of laying out a public highway is to make a free passage, not a profit of water craft. The easement is for land, not water, carriage, and therefore not to be touched by the latter without the permission of the owner.' Again, he remarked, 'Independent of what I take to have been the plain intent of the legislature, a landing, even though for the purpose of direct transit, is more than a highway. The relative rights, both of owner and passenger, in a highway, are perfectly understood and familiarly dealt with by the law. Subject to the right of mere passage, the owner of the soil is still absolute master.'

Respondent contends that the cases to which reference has been made have been practically overruled by the cases cited in its brief. The case of *Barney v. City of Keokuk*, 94 U. S. 336, is cited, among others, as adverse to appellant's contention. Reference is made in that case to



*Haight v. City of Keokuk*, 4 Ia. 199, from which the supreme court quoted approvingly, as was done in several other of the cases cited: 'The streets of a town are fairly subject to many purposes to which a highway in the country would not be. More regard should be paid to the object and purpose than to the name. The ways of a town would be of comparatively little use if the citizens and traders could not deposit their goods in them temporarily in their transit to the storehouse; and so of other things, and so it is of the wharf.' It will be observed that the court expressly distinguished the conditions existing in a town or city as to streets from those existing in the country in suburban regions, for the court said: 'The streets of a town are fairly subject to many purposes to which a highway in the country would not be.' This distinction is expressly recognized in *Barney v. City of Keokuk*, 94 U. S. 336, and by Mr. Dillon, where he states the rule in his work on *Municipal Corporations* (§ 633), and also in the leading case of *City of Cincinnati v. White*, 6 Pet. 431."

**Sec. 746. Accretion and reliction—Rights of riparian owners.** Title to land formed by accretion is determinable solely by the fact of accretion, and not by an assertion of a claim of ownership. *Bellefontaine Imp. Co. v. Neidringhaus*, 181 Ill. 426 (55 N. E. Rep. 184; 72 Am. St. Rep. 269; see pp. 280-286 for collation of authorities on the application of the law of accretions to islands in navigable rivers). One owning land fronting on a river is entitled to all the accretion thereto, although it may have been produced by dikes placed in the river by a city or by other artificial means. *Whyte v. City of St. Louis*, 153 Mo. 80 (54 S. W. Rep. 478). Deposits gradually formed on land on one side of a stream by the perceptible washing away of land on the other will pass to the former as accretions. *Quinlan v. Bratley*, Ia. (80 N. W. Rep. 405). An island or dry land formed by the receding of a river passes as an accretion to one to whom the United States previously granted the adjoining land, *McBaine v. Johnson*, 155 Mo. 191 (55 S. W. Rep. 1031); but a riparian owner on the bank of a navigable stream is not, by reason thereof, the owner of an island that springs up in the stream; and if, by accretion to such island, its water margin line unites with

the main shore, the new made land becomes part of the island and not of the main land, and the riparian ownership is not thereby extended. *Moore v. Farmer*, 156 Mo. 33 (56 S. W. Rep. 493; 79 Am. St. Rep. 504). One who owns land under a deed calling for the meanders of a river as a boundary has title to land made by alluvial deposits on his side of the thread of the main channel of the river. *Hunter v. Witt*, Ky. (50 S. W. Rep. 985; 21 Ky. Law Rep. 35). The owner of land bordering on a lake acquires no title to the bed thereof either as accretion or dereliction, where there has been no deposit forming alluvion, and no permanent subsidence of the water, uncovering land to become dereliction. The temporary uncovering of parts of the bed of the lake by the recurring annual ebb of the waters, to become covered again by their rise or flow at the appropriate season, does not constitute dereliction. *Sapp v. Frazier*, 51 La. Ann. 1718 (26 So. Rep. 378; 72 Am. St. Rep. 493). A riparian owner who seeks to establish title by reliction must show that all the land to which he thus claims title was formed by reliction from his shore, and his claim of title will not prevail where it appears from the evidence that at least a part of the dry land became such by the water receding either from islands or from another shore. *Hammond v. Shepard*, 186 Ill. 235 (57 N. E. Rep. 867; 78 Am. St. Rep. 274). For particular cases determining rights as to accretions, see *West Missouri Land Co. v. Thompson*, 157 Mo. 647 (57 S. W. Rep. 1042); *Gorton v. Rice*, 153 Mo. 676 (55 S. W. Rep. 241). For note on "Right to follow accretions across division line previously submerged by the action of the water," see 51 L. R. A. 425-427.

**Sec. 747. Accretions—Title of one claiming under patent.** Ownership of patented lands to the meander line of a lake carries with it the right to all lands formed by accretion or reliction below such lands to the water's edge; and a conveyance of land adjoining a lake conveys the grantor's right to such land as had or would attach to it by accretion or reliction as an incident to riparian ownership. *Hinckley v. Peay*, 22 Utah, 21 (60 Pac. Rep. 1012). An owner of lands claiming title under a patent which does not mention an adjacent river as a boundary,

but fixes the boundary next to such river by courses and distances, metes and monuments "between high and low water mark," cannot claim title to accretions formed on a strip of land consisting of several acres lying between such boundary and the edge of the water. *Sweringen v. City of St. Louis*, 151 Mo. 348 (52 S. W. Rep. 346). The court say: "It is fundamental in the law of accretions that the land to which they attach must be bounded by the river or stream to entitle its owner to such increase. The doctrine is one of compensation. The reason of the law is that every owner of land bounded by a stream of water is subject, by reason of the gradual changing of the course thereof, to lose a portion of his land, or have the same increased in quantity by the accumulation thereto, and, inasmuch as he is wholly without remedy if a loss occurs by the river eating away his banks, he is entitled to whatever increase, also, that is caused by the gradual accretion or reliction. In the very nature of things, then, accretions depend upon actual contiguity, without any separation of the claimant's land from the accumulated alluvion by the lands of another, however narrow the intervening strip may be, or whatever the size of the claimant's tract behind it. 1 Am. & Eng. Enc. Law (2nd Ed.) 473, note 2, and cases cited; Gould, Waters, § 155, note 1; *Ellinger v. Railway Co.*, 112 Mo. 525 (20 S. W. Rep. 800); *Smith v. City of St. Louis*, 21 Mo. 36."

**Sec. 748. Obstruction or diversion of waters.** One who causes damages to the land of another by reason of changing the channel of a stream by the erection of dikes is liable therefor, regardless of any question of negligence in their construction and maintenance. *Gulf, C. & S. F. Ry. Co. v. Clark*, 2 Ind. Ter. 319 (51 S. W. Rep. 962). The diversion and diminution of a natural stream of water, caused by arresting and collecting the underground waters which, percolating through the earth, feed the stream, is an interference with a natural riparian right for which the one injured thereby may maintain an action. *Smith v. City of Brooklyn*, 160 N. Y. 357 (54 N. E. Rep. 787; 45 L. R. A. 664). Upper riparian owners have no right to deepen the channel of a stream to the injury of the owner of a lower dam, for the purpose of reclaiming lands overflowed

by lakes which really are enlargements of the river. *Hyatt v. Albro*, 121 Mich. 638 (80 N. W. Rep. 641). One owning the whole or a part of the natural channel of a stream of water may have an injunction against the continuance of an obstruction or diversion thereof and to restore the stream to its original condition, although no actual damage is shown or found where the act complained of is such that its repetition or continuance may become the foundation or evidence of an adverse right. *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278 (56 N. E. Rep. 757). A complaint in an action for the recovery of damages for the pollution of a stream which alleges facts constituting such injury as entitles the plaintiff to recover, need not allege that the use of the stream on account of which the injury results by the defendant is unreasonable or unnecessary. *Muncie Pulp Co. v. Martin*, 23 Ind. App. 558 (55 N. E. Rep. 796). Proof of the wrongful diversion of water entitles the owner thereof to nominal damages though no specific damage be shown. *Watson v. New Milford Water Co.*, 71 Conn. 442 (42 Atl. Rep. 265). The measure of damages for causing a wrongful overflow of water on a riparian owner's land is the difference between the value of the premises immediately before and immediately after the infliction of the injury. *Hueston v. Mississippi & R. R. Boom Co.*, 76 Minn. 251 (79 N. W. Rep. 92). For particular case determining the measure of damages for overflowing land consisting mainly of a stone quarry, see *St. Louis Trust Co. v. Bambrick*, 149 Mo. 560 (51 S. W. Rep. 706). Particular evidence held sufficient to show a negligent diversion of the waters of a water course, to the injury of a land owner. *Burnett v. Great Northern Ry. Co.*, 76 Minn. 461 (79 N. W. Rep. 523).

**Sec. 749. Pollution of waters—Discharge of city sewage.** A city has no right to discharge a sewer into a tail race belonging to an individual where it runs through a culvert under a highway. *Nevins v. City of Fitchburg*, 174 Mass. 545 (55 N. E. Rep. 321; 47 L. R. A. 312). The threatened use of a stream by a city for the discharge of sewage into it which necessarily will result in producing a nuisance may be enjoined, *Sayre v. Mayor of City of Newark*, 58 N. J. Eq. 136 (42 Atl. Rep. 1068); but a city

will not be enjoined from discharging sewage into a stream until it has had reasonable time to provide other means for disposing of it, *Grey v. Mayor of City of Paterson*, 58 N. J. Eq. 1 (42 Atl. Rep. 749). In Indiana it is held that a city will not be enjoined from collecting and discharging its sewage into a stream which constitutes a natural drainage for it, where it does so through a system of sewers constructed skillfully and in conformity to the statute; and damages resulting to other riparian owners from such acts are consequential, and give them no right to compensation. *City of Valparaiso v. Hagen*, 153 Ind. 337 (54 N. E. Rep. 1062; 48 L. R. A. 707; 74 Am. St. Rep. 305). But in other states it is held that the fact that a city sewer is necessary, empties into a stream constituting the natural drainage for the city, and is authorized by statute, does not exempt the municipality from liability for the destruction or injury to property resulting from its construction and maintenance. *Huffmire v. City of Brooklyn*, 162 N. Y. 584 (57 N. E. Rep. 176; 48 L. R. A. 421); *Smith v. City of Sedalia*, 152 Mo. 283 (53 S. W. Rep. 907; 48 L. R. A. 711); *Grey v. Mayor of City of Paterson*, 58 N. J. Eq. 1 (42 Atl. Rep. 749). For note containing exhaustive collation of authorities on the right of municipal corporations to drain sewage into waters, see 48 L. R. A. 691-708.

**Sec. 750. Pollution of waters—Discharge of refuse from factory.** A discharge into a stream of the refuse of a pulp factory, containing acids and other unwholesome ingredients which accumulate and fill up the channel of the stream and spread over riparian lands to the material injury thereof, entitles the owner of such lands to recover damages. *Muncie Pulp Co. v. Martin*, 23 Ind. App. 558 (55 N. E. Rep. 796). The owner of a factory situate on the border of a stream is liable for damages for, and may be restrained from, polluting the stream by discharging into it the waste from his factory and he cannot escape such liability because of the expenditure of large sums of money in the construction of the factory and by showing that he conducts it in a careful manner, without malice, or because of the fact that the stream already is polluted by the discharge of the sewage of a city into it. *Weston*

*Paper Co. v. Pope*, 155 Ind. 394 (57 N. E. Rep. 719). The court say: "We think it is universally held that land on a lower level owes a natural servitude to that on a higher level, in respect to receiving the waters that naturally flow down to it in such state of increased impurity as is imposed by upper inhabitants from the ordinary use of their lands for domestic purposes. Every owner is entitled to the free use and enjoyment of his property, within reasonable bounds. He may do by his own land, in its use and development, as he pleases, and is not answerable for the elements and forces of nature that may by natural processes affect an inferior estate. And he is not confined to the surface. He may, with a careful regard for the rights of his neighbors, develop and utilize the natural resources of his land. He may sink deep wells and bring subterranean mineral waters to the surface, and, having used the water for baths in a sanitarium, may discharge it where by natural flowage it will find its way to lower lands, and there is no liability, as in *Barnard v. Sherley*, 135 Ind. 547 (34 N. E. Rep. 600; 35 N. E. Rep. 117; 24 L. R. A. 568, 575; 41 Am. St. Rep. 454). Or he may excavate for coal, and, if water is encountered, it may, whether pure or impure, be raised and discharged, in its natural state, upon the surface, where by gravitation it will find its way into a pure stream, rendering the waters thereof wholly unfit for domestic purposes, and there can be no redress, as in *Coal Co. v. Sanderson*, 113 Pa. St. 126 (6 Atl. Rep. 453; 57 Am. Rep. 445). The same rule recognizes the right of cities located upon the banks of a stream to discharge therein the city sewage, to the defilement of the water, when such discharge is necessary, as the only practicable means of dispatching the sewage. *City of Richmond v. Test*, 18 Ind. App. 482 (48 N. E. Rep. 610); *City of Valparaiso v. Hagen*, 153 Ind. 337 (54 N. E. Rep. 1062; 74 Am. St. Rep. 305; 48 L. R. A. 707). The principle underlying this class of cases is that the public has a general interest in the business carried on, as in being cured of diseases by mineral water, baths, and in procuring coal for fuel, and in promoting city sanitation, and since the business is of a character that it cannot be conducted at any other place than where nature has located it, or where public necessity requires it to be, individual rights must yield to the public

good. The principle of these cases, however, is not applicable to the case before us. Here appellant is not engaged in the development of any natural resource, or on any usual or ordinary use of its own land. Its sole business is the manufacture of articles of commerce for its own profit. It is engaged in a business that may be carried on elsewhere less injuriously to the rights of others. It is engaged in bringing to its mill, not from its own premises, but from elsewhere, materials from which, by artificial means, it evolves putrescent matter, which it casts into Brandywine creek, to the serious and substantial injury of lower proprietors. This, appellant has no right to do. No court, so far as we have observed, has gone so far as to recognize the right of a manufacturer to establish his plant upon the banks of a nonnavigable stream, and pollute its waters by a business wholly brought to the place, entirely disconnected with any use of the land itself, and which he may just as well conduct elsewhere, without responding in damages to those injured thereby, and to injunction if the injury done is substantial and continuing. See *Indianapolis Water Co. v. American Strawboard Co.*, (C. C.) 53 Fed. Rep. 970; *Robb v. Carnegie Bros. & Co.*, 145 Pa. St. 324 (22 Atl. Rep. 649; 14 Atl. Rep. 329; 27 Am. St. Rep. 694; 14 L. R. A. 329); *Lentz v. Carnegie Bros. & Co.*, 145 Pa. St. 612 (23 Atl. Rep. 219; 27 Am. St. Rep. 717); *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317 (2 Sup. Ct. Rep. 719; 27 L. Ed. 739); *Barton v. Cattle Co.*, 28 Neb. 350 (44 N. W. Rep. 454; 7 L. R. A. 457; 26 Am. St. Rep. 340); *Mills Co. v. Smith*, 69 Miss. 299 (11 So. Rep. 26; 30 Am. St. Rep. 546).

The fact that appellant has expended a large sum of money in the construction of its plant, and that it conducts its business in a careful manner and without malice, can make no difference in its rights to the stream. Before locating the plant the owners were bound to know that every riparian proprietor is entitled to have the waters of the stream that washes his land come to it without obstruction, diversion or corruption, subject only to the reasonable use of the water, by those similarly entitled, for such domestic purposes as are inseparable from, and necessary for, the free use of their land; and they were bound, also, to know the character of their proposed business, and

to take notice of the size, course and capacity of the stream, and to determine for themselves, and at their own peril, whether they should be able to conduct their business upon a stream of the size and character of Brandywine creek without injury to their neighbors; and the magnitude of their investment and their freedom from malice furnish no reason why they should escape the consequences of their own folly. *Pennoyer v. Allen*, 56 Wis. 502 (14 N. W. Rep. 609; 43 Am. Rep. 728); *City of Tiffin v. McCormack*, 34 O. St. 638; *Powder Co. v. Tearney*, 131 Ill. 322 (23 N. E. Rep. 389; 7 L. R. A. 262; 19 Am. St. Rep. 34); *McAndrews v. Collerd*, 42 N. J. L. 189 (36 Am. Rep. 508); *Heeg v. Licht*, 80 N. Y. 579 (36 Am. Rep. 654); *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317 (2 Sup. Ct. Rep. 719; 27 L. Ed. 739).

It is no defense that the city of Greenfield empties its sewage into the stream, whereby it is polluted. The fact that a water course is already contaminated from various causes does not entitle others to add thereto, nor preclude persons through whose land the waters flow from obtaining relief by injunction against its further pollution. *Dennis v. State*, 91 Ind. 291, 293; *Barrett v. Association*, 159 Ill. 385 (42 N. E. Rep. 891; 31 L. R. A. 109; 50 Am. St. Rep. 108); *Wood, Nuis.* §§ 448, 558." For recent statute in Indiana prohibiting the discharge of waste water or refuse of a factory into a stream without permit from the state board of health, see *Laws 1901*, p. 96.

**Sec. 751. Miscellaneous notes.** A corporation having no land on a stream except an acre bought by it for a pumping station, is not a riparian owner. *Bank of Hopkinsville v. Western Kentucky Asylum*, Ky. (56 S. W. Rep. 525; 21 Ky. Law Rep. 1820). A lower riparian owner who has been compensated in damages for an upper appropriation of water by a water company under the right of eminent domain is not concerned in the use by the company of the water it is entitled to receive under its appropriation, so long as it does not take an excess of what it is authorized to take. *Hamor v. Bar Harbor Water Co.*, 92 Me. 364 (42 Atl. Rep. 790).



## SPECIFIC PERFORMANCE

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### EPITOME OF CASES.

**Sec. 752. What contracts may be specifically enforced—General principles.** Equity will not specifically enforce an inequitable, unreasonable or illegal contract: *Kirkland v. Downing*, 106 Ga. 530 (32 S. E. Rep. 632); *Shinkle v. Vickery*, 156 Mo. 1 (55 S. W. Rep. 456); *Ferguson v. Blackwell*, 8 Okla. 489 (58 Pac. Rep. 647); *Eclipse Oil Co. v. South Penn Oil Co.*, 47 W. Va. 84 (34 S. E. Rep. 923); *Newman v. Freitas*, 129 Cal. 283 (61 Pac. Rep. 907). A contract by a cestui que trust made in violation of the trust will not be enforced specifically. *Millsaps v. Shotwell*, 76 Miss. 923 (25 So. Rep. 359). A contract will not be enforced specifically unless its character be such as either party to it could have it enforced specifically against the other. *Stanton v. Singleton*, 126 Cal. 657 (59 Pac. Rep. 146; 47 L. R. A. 334). Although no difficulty may attend the execution of a contract on the part of the defendant, yet, unless there be mutuality as to the remedy as well as the obligation, so that the complainant in case of his default could be compelled to perform, specific performance will not be decreed, but the parties will be left to other remedies. *Chadwick v. Chadwick*, 121 Ala. 580 (25 So. Rep. 631). Where performance of a contract has been rendered wholly impossible, the vendee has no standing in a court of equity, but must proceed at law for damages; but where partial performance may be made by the vendor, the vendee may enforce it, if he is willing to accept what can be conveyed. *Brown v. Ward*, 110 Ia. 243 (81 N. W. Rep. 247). Specific performance of a contract will not be decreed where it involves a continuous and long series of acts of supervision requiring special knowledge and skill, and repeated examinations and new directions, such as would be required in enforcing a contract for opening and developing mining property which consists of a large number of mining claims of different kinds, and

for erecting a quartz mill modern in every particular, with stamps of a certain weight, or its "equivalent," without specifying where the mill is to be built or when the contract is to be performed. *Stanton v. Singleton*, 126 Cal. 657 (59 Pac. Rep. 146; 47 L. R. A. 334).

**Sec. 753. What contracts may be specifically enforced—Particular cases.** An agreement by one so afflicted by disease as to make the care of him an arduous and unpleasant task, to convey all of his property to a friend if she would receive him into her home and care for him until his recovery or death, may be enforced specifically, where she fully performed her part of the agreement and the other party dies without executing the conveyance. *Lothrop v. Marble*, 12 S. Dak. 511 (81 N. W. Rep. 885; 76 Am. St. Rep. 626). A contract between two persons engaged in buying lands in the same section of country, to avoid competition and secure the lands at a reduced price, that one shall buy for both and that lands thus bought shall be divided between them, in pursuance of which one retires from the business and the other purchases the lands according to the agreement and takes deeds therefor in his own name, may be specifically enforced against him and third persons to whom he afterward transfers the land and who agree to perform the agreement but afterward refuse to do so. *Camden v. Dewing*, 47 W. Va. 316 (34 S. E. Rep. 911).

**Sec. 754. Contracts to convey land.** To authorize the specific performance of a parol contract to convey land its existence and terms must be clearly established. *Wright v. Raftree*, 181 Ill. 464 (54 N. E. Rep. 998); *Huntington & K. Land Dev. Co. v. Thornburg*, 46 W. Va. 99 (33 S. E. Rep. 108). A contract for the sale of lands will not be enforced specifically unless the parties have described and identified the particular tract, or the contract furnishes the means of identifying with certainty the land to be conveyed. *Ferguson v. Blackwell*, 8 Okla. 489 (58 Pac. Rep. 647). The execution of a conveyance by a married woman who buys with notice of a contract to convey to another may be decreed in equity. *Fee v. Sharkey*, 59 N. J. Eq. 284 (44 Atl. Rep. 673). The right of the assignee of a con-

tract for the sale of land to have specific performance is not greater than that of his assignor. *Mack v. McIntosh*, 181 Ill. 633 (54 N. E. Rep. 1019). A defendant will not be compelled specifically to perform a contract to purchase land, where a material fact, constituting an indispensable link in the complainant's chain of title, depends for its proof entirely and exclusively upon the evidence of two certain witnesses. *Fahy v. Cavanagh*, 59 N. J. Eq. 278 (44 Atl. Rep. 154). Specific performance will not be awarded to a vendor who obtained his contract by knowingly concealing or misrepresenting the state of his title, as to defects therein or incumbrances against the same, although his title has been perfected after suit brought, where the vendee asks to be relieved from the contract. *Spencer v. Sandusky*, 46 W. Va. 582 (33 S. E. Rep. 221). Particular contract held too indefinite and uncertain in its terms to authorize specific performance. *Wright v. Rafferty*, 181 Ill. 464 (54 N. E. Rep. 998).

**Sec. 755. Contracts to convey land in consideration of support.** A contract by which one is to have a conveyance of land in consideration of his agreement to allow his mother to reside with him and to support her for life, cannot be enforced specifically. *Chadwick v. Chadwick*, 121 Ala. 580 (25 So. Rep. 631). The court say: "The chief consideration moving to the defendant for the conveyance which the complainant seeks to compel is the agreement on his part to allow the defendant to reside with him, and to support her during her life. It is an undertaking which implies the legal duty on his part not only to furnish necessities for defendant's support, but to treat her with due consideration, so that her existence as a member of his household might at least be tolerable. The court of equity will not undertake to regulate or control the performance of such continuous duties, and it would be powerless to do so by any of its processes. *Bumpus v. Bumpus*, 53 Mich. 346 (19 N. W. Rep. 29); *Bourget v. Monroe*, 58 Mich. 563 (25 N. W. Rep. 514); *Mowers v. Fogg*, 45 N. J. Eq. 120 (17 Atl. Rep. 296). Even if such power existed, yet its exercise in such a controversy, between a mother and her son, would be of doubtful expediency. The incidents of such interference by the court would go far to

engender feelings of antagonism between the parties, destructive of the affection and confidence natural to the relation, and which, in the interest of society at large, the court of equity would conserve, rather than disrupt."

**Sec. 756. Performance and good faith required of party seeking.** One in whose favor a conditional decree of specific performance has been rendered is not entitled to enforce such decree until he performs the conditions imposed upon him by it. *Peck v. Zborowski*, 13 S. Dak. 182 (82 N. W. Rep. 387). Where time is made the essence of a contract, a party who has failed promptly to perform his part thereof cannot have specific performance. *Skeen v. Patterson*, 180 Ill. 289 (54 N. E. Rep. 196). Specific performance will not be decreed in favor of a vendee who by fraud has procured the filing of a mechanic's lien against the property so as to embarrass his vendor in the performance of his contract. *Mack v. McIntosh*, 181 Ill. 633 (54 N. E. Rep. 1019).

**Sec. 757. Complaint and parties in action for specific performance.** A bill for the specific performance of a contract providing for the assumption of mortgages and the execution of new ones should show the terms upon which the mortgages were to be given. *Lee v. Stone*, 21 R. I. 123 (42 Atl. Rep. 717). A complaint to enforce specific performance of a contract arising on account of the acceptance by the plaintiff of an offer is insufficient where it fails to show that the notice of acceptance was complete before the offer was withdrawn. *Storch v. Duhnke*, 76 Minn. 521 (79 N. W. Rep. 533). Under Cal. Civ. Code, § 3391, the plaintiff must aver and prove that the party to the contract against whom he seeks specific performance received an adequate consideration for the contract, and that as to him the contract is just and reasonable. *Windsor v. Miner*, 124 Cal. 492 (57 Pac. Rep. 386). A party who conveys his equitable interest under a contract is not a necessary party to a bill by his assignee for its specific performance. *Davis v. Williams*, 121 Ala. 542 (25 So. Rep. 704).

**Sec. 758. Practice in actions for specific performance.** Neither party is entitled to trial by jury. *Pierce v. Stew-*

art, 61 O. St. 422 (56 N. E. Rep. 201). In an action for the specific performance of a contract to exchange land, the court properly may require the removal of incumbrances on land to be conveyed by the defendant, according to the terms of the contract; and, for this purpose, may make the holders of such incumbrances parties and direct the application of the payments to be made by the plaintiff to their removal. *Hudson v. Max Meadows L. & Imp. Co.*, 97 Va. 341 (33 S. E. Rep. 586). Where the vendor's incapacity to perform the contract, though caused by his own act,—as by his conveyance to a bona fide purchaser,—is known to the complainant or vendee at the time of bringing suit, the bill will not be retained for the assessment of damages, but will be dismissed, leaving the complainant to his or her legal remedy for the recovery of said damages. *Mack v. McIntosh*, 181 Ill. 633 (54 N. E. Rep. 1019). In an action by a vendor for specific performance of a contract for the sale of real estate, brought against his vendee on the ground that the latter refuses to perform, the court should find in its decree the amount due on the contract; and it is also proper that it should fix a reasonable time in the decree within which the money must be paid, and provide that in case of the vendee's default his rights and interest in the property shall terminate. *London & Northwest Amer. Mortg. Co. v. McMillan*, 78 Minn. 53 (80 N. W. Rep. 841). In an action to compel the specific performance of a contract for the conveyance of land, where it appears that the vendee has been kept out of possession by the wrongful act of the vendor, the general rule is that the latter will be regarded as a trustee of the land for the benefit of the former, and must account to him for the rents and profits which he received or might have realized by due diligence. This rule is not inflexible in its application, for, if there are no rents and profits, or if they are less than the value of the use of the land, the vendor, in the discretion of the court, may be charged with the value of such use during the time the vendee is so kept out of possession. In special cases, where equity requires it, the court will not allow the vendor any interest on the purchase price during the time he retains possession of the land, nor charge him with the interim rents and profits. Equity will in each case place the parties, so far

as possible, in the same situation as they would have been if the contract had been performed according to its terms. *Abrahamson v. Lamberson*, 79 Minn. 135 (81 N. W. Rep. 768). Construing and applying Sand. & H. Ark. Dig., §§ 5712, 5723, which define a cross complaint and counterclaim and provide when they may be pleaded, it is held that a defendant in an action brought by the heirs of a decedent for specific performance of a contract to convey land can neither by cross complaint nor counterclaim set up the execution of a deed of trust on the same land, for his benefit, by decedent, allege a mistake in the description of the premises, and pray that the deed be reformed and foreclosed. *Hays v. McLain*, 66 Ark. 400 (50 S. W. Rep. 1006). As to parties, pleading and practice in an action for specific performance of a testatrix's agreement to devise property, see *Kempton v. Bartine*, 59 N. J. 149 (44 Atl. Rep. 461).

**Sec. 759. Defenses to action for specific performance.**

The lack of mutuality in a contract is no defense where the party not bound thereby has performed all of the conditions of the contract and brought himself clearly within the terms thereof. *Boyd v. Brown*, 47 W. Va. 238 (34 S. E. Rep. 907). Oral waiver or abandonment of an oral contract for the purchase of land, when clearly proved, will defeat an action for specific performance by the purchaser, if the possession be surrendered to the vendor, but not otherwise. *Cunningham v. Cunningham*, 46 W. Va. 1 (32 S. E. Rep. 998). In North Carolina the statute of frauds is a good defense to an action by a vendee to enforce a parol contract for the purchase of real estate, although the latter has paid the purchase price, taken possession and made improvements; but the vendor cannot recover possession of the land without returning the purchase price and accounting for the improvements. *Pass v. Brooks*, 125 N. C. 129 (34 S. E. Rep. 228). The vendor of mineral interests who covenants to warrant his title cannot have specific performance where he has no title to a portion of the land, although the vendee was aware of such want of title when the contract was made. *Mincy v. Foster*, 125 N. C. 541 (34 S. E. Rep. 644).

# STARTING FIRES

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## EPITOME OF CASES.

**Sec. 760. Destruction of insured property—Rights of parties.** The right of the owner of property to maintain an action against a railroad for its destruction of property by fire is not affected by the fact that the property was insured. *Peter v. Chicago & W. M. R. Co.*, 121 Mich. 324 (80 N. W. Rep. 295; 46 L. R. A. 224; 80 Am. St. Rep. 500). When property destroyed by a railroad company, under such circumstances as to make the company liable therefor, under Ohio Laws, Vol. 91, p. 187, is insured, the right of the owner, as against the railroad company and the insurer, is limited to indemnity for his loss; and the ultimate liability for such loss is upon the railroad company, and, in an action brought for its enforcement, the owner and the insurer being parties, there should be a recovery for the value of the property destroyed without deduction on account of payments made to the owner by the insurer in discharge of the obligation imposed by its policy. *Lake Erie & W. R. Co. v. Falk*, 62 O. St. 297 (56 N. E. Rep. 1020). An insurance company paying to the owner of property the loss occasioned by its destruction by a railroad is entitled to be subrogated to the rights of the insured against the railroad company, *Lumberman's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.*, 149 Mo. 165 (50 S. W. Rep. 281); and it may intervene in an action brought by the insured against the railroad company for damages, to protect this right of subrogation, and the amount recovered from the railroad company should be adjudged to the owner and the insurer according to their respective interests, *Lake Erie & W. R. Co. v. Falk*, 62 O. St. 297 (56 N. E. Rep. 1020).

**Sec. 761. Contributory negligence.** Under Conn. Gen. Stat., § 3581, one who has been guilty of contributory negligence cannot recover for injury by fire communicated

by a locomotive of a railroad company. *Hubbard v. New York, N. H. & H. R. Co.*, 72 Conn. 24 (43 Atl. Rep. 550). Me. Rev. Stat., ch 51, § 64, providing that "when a building or other property is injured by fire communicated by a locomotive engine, the corporation using it is responsible for such injury, and it has an insurable interest in the property along the route for which it is responsible, and may procure insurance thereon," imposes upon corporations operating locomotives the liability of insurers, and the doctrine of contributory negligence does not apply. *Boston Excelsior Co. v. Bangor & A. R. Co.*, 93 Me. 52 (44 Atl. Rep. 138; 47 L. R. A. 82). In Michigan it is held by a divided court that contributory negligence is not a defense to the liability of railroad companies for fires, under How. Ann. Stat., § 3378, which creates an absolute liability for all loss or damage by such fires, with a proviso against liability on proof of certain facts, among which contributory negligence is not specified. *Peter v. Chicago & W. M. R. Co.*, 121 Mich. 324 (80 N. W. Rep. 295; 46 L. R. A. 224; 80 Am. St. Rep. 500). As to whether the owner of a building is guilty of contributory negligence in allowing combustible materials to accumulate around it by means of which fire is communicated to the building from a railroad, is a question for the jury. *Kimball v. Borden*, 97 Va. 477 (34 S. E. Rep. 45). For particular facts held to authorize the submission of the question of contributory negligence to the jury, see *Liverpool & L. & G. Ins. Co. v. Southern Pac. Co.*, 125 Cal. 434 (58 Pac. Rep. 55).

**Sec. 762. Contributory negligence—Failure to guard a factory building near railroad right of way.** The owner of a factory building near a railroad right of way, which is destroyed by fire communicated therefrom, is not guilty of contributory negligence in leaving the building closed and unguarded, although he had knowledge of the existence of combustible material on such right of way on account of which the fire originated. *Pittsburg, C. C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322 (56 N. E. Rep. 766). The court say: "The rule is that a person erecting a building on real estate adjoining a railroad track takes upon himself the risk of fire being communicated thereto without the fault of the railroad company.



Railway Co. v. Paramore, 31 Ind. 143. He is not required to keep his property in such a condition as to guard against the negligence of the company, nor to stand guard over it continually to protect it against such negligence, but he has the right to construct buildings on any part of his property, and enjoy the same, without any regard to the proximity of a railroad; and such use of his property cannot be declared contributory negligence in an action against the railroad company for negligently setting fire to the buildings. *Railway Co. v. Burger*, 124 Ind. 275 (24 N. E. Rep. 981); *Railway Co. v. Jones*, 86 Ind. 496; *Tein v. Railway Co.*, 15 Ind. App. 304 (44 N. E. Rep. 45); *Railroad Co. v. Kern*, 9 Ind. App. 505 (36 N. E. Rep. 381); *Railroad Co. v. Smith*, 6 Ind. App. 262 (33 N. E. Rep. 241); *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Mfg. Co.*, 27 Fla. 1, 157 (9 So. Rep. 661; 17 L. R. A. 33, 52); *Burke v. Railroad Co.*, 7 Heisk. 451 (19 Am. Rep. 618); *Railroad Co. v. Richardson*, 91 U. S. 454 (23 L. Ed. 356); *Railway Co. v. Hendrickson*, 80 Pa. St. 182; *Jefferis v. Railroad Co.*, 3 Houst. 447; *Railway Co. v. Barker*, 94 Ky. 71 (21 S. W. Rep. 347); 8 Lewis, R. R. & Corp. Cas., note, p. 68; 13 Am. & Eng. Enc. Law (2d Ed.) 482-487; *Shear. & R. Neg.* (5th Ed.) § 680; 3 Elliott, R. R. § 1238; *Railway Co. v. Smock*, 133 Ind. 411 (33 N. E. Rep. 108). The officers and representatives of appellee had no knowledge of said fire until too late for them to save any of the property; and, although some of them knew of the existence of the combustible material on the right of way, yet, under the authorities above cited, they were not required to guard and continually watch the factory, nor to remove the rubbish from appellant's right of way. They had the right to assume that appellant would perform the legal duties resting upon it. *Tien v. Railway Co.*, 15 Ind. App. 304 (44 N. E. Rep. 45), and cases above cited. As was said in *Tien v. Railway Co.*, 15 Ind. App. 304 (44 N. E. Rep. 45): "The landowner is not required to live upon his premises, and keep a vigilant outlook for possible negligence upon the part of others, nor is he required to hire guards for that purpose. He is not bound to anticipate that another will be derelict in his duty toward him. He may rely upon the presumption that such person will conform to the legal duties resting upon him."

**Sec. 763. Liability of railroad companies for fires—**

**Negligence.** Railroad companies are not absolutely required to keep their rights of way free from combustible materials, but the exercise of reasonable care in this particular is sufficient. *Waters v. Atlantic City R. Co.*, N. J. L. (43 Atl. Rep. 670). A railroad company setting fire to combustible materials on its right of way is liable for the destruction of property resulting from the spreading of the fire. *Lake Erie & W. R. Co. v. Miller*, 24 Ind. App. 662 (57 N. E. Rep. 596). In New York it is held that negligence in starting a fire is not the approximate cause of the destruction of property on lands which do not abut the premises on which the fire started, but to which it spread across intervening lands. *Parker, C. J., & Vann, J., dissenting. Hoffman v. King*, 160 N. Y. 618 (55 N. E. Rep. 401; 45 L. R. A. 672; 73 Am. St. Rep. 715). The contrary is held in Indiana, where the injury results from the spreading of the fire without the intervention of any independent and responsible human cause. *Chicago & E. I. R. Co. v. Ross*, 24 Ind. App. 222 (56 N. E. Rep. 451). It is negligence for a railroad company to permit the accumulation of combustible material near the building of another standing close to its right of way; and it is liable for the destruction of such building caused by the spreading of a fire which started from a spark emitted from its locomotive on such material, although such locomotive was properly equipped and carefully managed and the company had no knowledge of the fire. *Pittsburg, C. C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322 (56 N. E. Rep. 766). In Kentucky it is held that a railroad company, authorized by its charter to use steam power, has necessarily the right to use fire as a means of generating steam, and is not liable for injuries resulting from sparks escaping from its locomotive, if it was furnished at the time with the best and most approved screen and spark arrester in practical use, when these appliances were in perfect order, if not otherwise guilty of negligence in the operation of its engine. *Louisville & N. R. Co. v. Samuel's Ex'rs*, Ky. (57 S. W. Rep. 235). In Texas it is held that in an action against a railroad company for fire, proof by the plaintiff that the injury complained of was caused by fire set out by sparks from a railroad locomotive

while it was being operated upon the road, constitutes a prima facie case of negligence; which, if not rebutted, entitles the plaintiff to recover. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 92 Tex. 591 (50 S. W. Rep. 563); *Scott v. Texas & P. Ry. Co.*, 93 Tex. 625 (57 S. W. Rep. 801). In an action against a railroad company for damages by fire alleged to have been occasioned by the emission of sparks from one of its locomotives, in the absence of a statute, the burden of proof is upon the plaintiff to show not only that the fire was communicated by the engine, but also that the defendant's servants were guilty of negligence and their negligence was the cause of the communication of the fire; the communication of the fire alone does not import negligence nor will the starting of a fire be presumed from proof of negligence. *Missouri, K. & T. Ry. Co. v. Wilder*, Ind. Ter. (53 S. W. Rep. 490). See opinion for review of authorities. The presumption of negligence arising from the starting of a fire by a locomotive is not overcome by proof that the engineer who handled the engine that set out the fire was competent and skillful. *St. Louis, I. M. & S. Ry. Co. v. Ayres*, 67 Ark. 371 (55 S. W. Rep. 159).

**Sec. 764. Liability of railroad companies for fires—**  
**Statutes construed.** A fire set out by the section men of a railroad company in burning the grass and weeds along its right of way, is not "set out or caused by operating" its road, within the meaning of Ia. Code 1873, § 1289, so as to make it liable for the resulting damages without the injured party proving negligence on the part of the company. *Connors v. Chicago & N. W. Ry. Co.*, 111 Ia. 384 (82 N. W. Rep. 953). Under How. Ann. Mich. Stat., § 3378, a railroad company is exonerated from liability for injuries by fire where it is shown that the appliances used by it to limit and prevent the escape of sparks of fire were such as had been in effective use for a long time. *Peter v. Chicago & W. M. R. Co.*, 121 Mich. 324 (80 N. W. 295; 46 L. R. A. 224; 80 Am. St. Rep. 500). When, in an action to recover damages from a railroad company occasioned by a fire which was started by one of the defendant's locomotives, the presumption of defect in the construction or equipment of such locomotive, or of negligence in its operation,

which N. Dak. Codes, § 2984, raises, has been overcome by proper evidence introduced by the defendant; yet the evidence shows that the same locomotive, on the same day, and within a distance of ten miles or less, set three different fires, it is not error to submit to the jury the question of defects in the construction or equipment of such locomotive, or negligence in its operation. Where, in such an action, negligence is also charged in permitting combustible material to accumulate on the right of way, which was ignited by sparks or fire from the locomotive thus causing the fire which occasioned the damages, it is not necessary for the plaintiff to prove title or ownership of the locus in quo in defendant. If he show that defendant was using the ground as a part of its right of way, that will be sufficient. The use being shown, the law will presume that the right to use has been properly acquired. *McTavish v. Great Northern Ry. Co.*, 8 N. Dak. 333 (79 N. W. Rep. 443). This case is approved and followed in *Young v. Great Northern Ry. Co.*, 8 N. Dak. 345 (79 N. W. Rep. 448). Ohio Laws, Vol. 91, p. 187, imposes upon every railroad company operating a railroad or part thereof in this state an absolute liability for loss or damage by fire, originating on its land, caused by operating the road, and the fact that the fire originated on the land of the company is made prima facie evidence that it was caused by operating the road; and in an action for such loss or damage, it is not necessary to allege or prove negligence on the part of the company, nor is the absence of such negligence a defense. But a different rule of liability and of evidence is provided by the act, where the loss or damage is caused by the fire originating on land adjacent to the land of the railroad company. In such cases the company is liable only when the fire was caused in whole or in part by sparks from an engine on or passing over the road, and the fact that the fire was so caused is made prima facie evidence of negligence on the part of the company or person operating the road. But this prima facie case of negligence may be overcome by proof, under a proper pleading, that the company exercised due care, the burden being on the company to show that it was free from negligence. *Baltimore & O. R. Co. v. Kreager*, 61 O. St. 312 (56 N. E. Rep. 203). Under this statute the liability of the railroad

company is established when it is admitted or proved that the fire which caused the destruction originated on the land of the company and was caused by the operation of its road. *Lake Erie & W. R. Co. v. Falk*, 62 O. St. 297 (56 N. E. Rep. 1020). S. C. Rev. Stat., § 1688, making a railroad company responsible in damages for destruction of property by fire communicated from its locomotives, and giving them an insurable interest in property along their routes for which they may be held so responsible, does not restrict their liability to such property only as they may be able to procure insurance upon. *Dean v. Charleston & W. C. Ry. Co.*, 55 S. C. 504 (33 S. E. Rep. 579). Citing, *Perley v. Railroad Co.*, 98 Mass. 414 (94 Am. Dec. 645); *Grissell v. Railroad Co.*, 54 Conn. 447 (9 Atl. Rep. 137; 1 Am. St. Rep. 138); *Campbell v. Railroad Co.*, 121 Mo. 340 (25 S. W. Rep. 936; 42 Am. St. Rep. 530); *Pratt v. Railroad Co.*, 42 Me. 579. A similar statute in Missouri (Rev. Stat. 1889, § 2615) is held constitutional; and the right of a railroad company to procure insurance upon property under the statute is not limited to property immediately adjoining its right of way. *Lumberman's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.*, 149 Mo. 165 (50 S. W. Rep. 281).

**Sec. 765. Action for injury by fire—Complaint—**  
**Statute of limitations.** A complaint that states facts which in law make a prima facie case of negligence, is sufficient without an express allegation of negligence. *Baltimore & O. R. Co. v. Kreager*, 61 O. St. 312 (56 N. E. Rep. 203). In an action against a railroad for injury by fire it is sufficient to allege in general that the fire was occasioned by the negligence and carelessness of its servants and agents, without alleging any facts showing that such servants and agents were acting within the scope of their employment; nor is it necessary for the complaint to allege that it had failed to provide a spark arrester for the locomotive causing the fire, as required by Ky. Stat., § 782. *Louisville & N. R. Co. v. Spring-Water Distilling Co.*, Ky. (53 S. W. Rep. 275; 21 Ky. Law Rep. 769). As to what statute of limitations applies to an action against a railroad company for fire, in Kentucky, see *Louisville & N. R. Co.*

v. Spring-Water Distilling Co., Ky. (53 S. W. Rep. 275; 21 Ky. Law Rep. 769).

**Sec. 766. Action for injury by fire—Evidence and instructions.** That a fire was started by sparks emitted from a passing locomotive may be proved either by direct or circumstantial evidence, or both. *Pittsburg, C. C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322 (56 N. E. Rep. 766). In an action against a railroad company for damages caused by starting fires on its right of way the plaintiff may show, for the purpose of showing what right of way had been in use by the defendant, that after the fire it caused fire breaks to be constructed on both sides of its track as the statute requires they shall be constructed along the line of its right of way. *Young v. Great Northern Ry. Co.*, 8 N. Dak. 345 (79 N. W. Rep. 448). In an action for injury resulting from the spreading of fire dumped from a threshing engine, by the rising of the wind in the evening of a still day, one who had lived in the country many years and was familiar with its climatic conditions, may testify that at that season of the year the wind usually arose on the evening of a hot, sultry day, such as that on which the fire causing the damage occurred. *Lieuallen v. Mosgrove*, 37 Or. 446 (61 Pac. Rep. 1022). Where farm lands injured by a fire are held by the plaintiff for rental purposes only, evidence of their rental value after the fire is admissible for the purpose of showing the extent to which the consequences of the injury might have been avoided by plaintiff by subsequent rental. *St. Louis, I. M. & S. Ry. Co. v. Ayres*, 67 Ark. 371 (55 S. W. Rep. 159). It is error to instruct the jury, in an action against a railroad company for fire, that it was the duty of the defendant "to provide its locomotive engine with a spark arrester most approved by those who, from experience and business, are most competent to judge and determine," as all the law requires is that it shall provide and use the best and most effectual appliance for this purpose in general use. *Louisville & N. R. Co. v. Samuel's Ex'rs*, Ky. (57 S. W. Rep. 235). For cases determining particular questions as to the admissibility of evidence and applicability of instructions in actions for injury by fire, see *Dore v. Babcock*, 72 Conn. 408 (44 Atl. Rep. 736); Penn-

sylvania Co. v. Hunsley, 23 Ind. App. 37 (54 N. E. Rep. 1071); Pittsburgh, C. C. & St. L. Ry. Co. v. Indiana Horse-shoe Co., 154 Ind. 322 (56 N. E. Rep. 766); Lake Erie & W. R. Co. v. Miller, 24 Ind. App. 662 (57 N. E. Rep. 596); Bradley v. Iowa Cent. Ry. Co., 111 Ia. 562 (82 N. W. Rep. 996); Liverpool & L. & G. Ins. Co. v. Southern Pac. Co., 125 Cal. 434 (58 Pac. Rep. 55); Moore v. Wilmington & W. R. Co., 124 N. C. 338 (32 S. E. Rep. 710); Scott v. Texas & P. Ry. Co., 93 Tex. 625 (57 S. W. Rep. 801); Kansas City, Ft. S. & M. R. Co. v. Chamberlin, 61 Kan. 859 (60 Pac. Rep. 15); Lieuallen v. Mosgrove, 37 Or. 446 (61 Pac. Rep. 1022). Particular evidence held insufficient to authorize the recovery against a railroad company for the destruction of property by fire. Southern Ry. Co. v. Myers, 108 Ga. 165 (33 S. E. Rep. 917); Brennan Lumber Co. v. Great Northern Ry. Co., 77 Minn. 360 (79 N. W. Rep. 1032).

**Sec. 767. Action against railroad company for injury by fire—Admission of evidence as to the starting of other fires.** Evidence of the starting of other fires and the condition of the right of way is not competent in an action against a railroad company for damages on account of its negligently permitting a fire started on its right of way to spread and destroy the property of another. Lake Erie & W. R. Co. v. Miller, 24 Ind. App. 662 (57 N. E. Rep. 596). Where the locomotive starting a fire is fully identified, it is improper to admit evidence that other locomotives of the defendant emitted fire and sparks upon other occasions. Missouri, K. & T. Ry. Co. v. Wilder, Ind. Ter. (53 S. W. Rep. 490). See opinion for review of authorities, also Ballards' Law of Real Prop., Vol. VII, § 752. Upon this subject, in the case of Chicago & E. I. Ry. Co. v. Ross, 24 Ind. App. 222 (56 N. E. Rep. 451), the appellate court of Indiana say: "It is stated in Railway Co. v. Gilmore, 22 Ind. App. 470 (53 N. E. Rep. 1079), that, 'where a particular engine is identified as the one which caused the fire for which the action is brought, evidence that the same engine caused other fires about the same time is admissible, and may be considered by the jury as tending to prove the defective condition or the improper management of that engine at the time it set out the fire in issue; but in such

case other fires, set out by other engines, are collateral matters, and evidence thereof cannot be considered by the jury as tending to show the improper construction or imperfect condition of such particular engine, or the bad management thereof, and therefore such evidence should not be given any influence in the determination of the jury in such case.' *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land Transp. & Mfg. Co.*, 27 Fla. 1, 157 (9 So. Rep. 661; 17 L. R. A. 33, 65); *Glaser v. Lewis*, 17 Phila. 345; *Ireland v. Railroad Co.*, 79 Mich. 163 (44 N. W. Rep. 426); *Nelson v. Railroad Co.*, 35 Minn. 170 (28 N. W. Rep. 215); *Coale v. Railroad Co.*, 60 Mo. 227; *Lester v. Railroad Co.*, 60 Mo. 265; *Haseltine v. Railroad Co.*, 64 N. H. 545 (15 Atl. Rep. 143); *Gibbons v. Railroad Co.*, 58 Wis. 335 (17 N. W. Rep. 132); *Henderson v. Railroad Co.*, 144 Pa. St. 461 (22 Atl. Rep. 851; 16 L. R. A. 299; 27 Am. St. Rep. 652); *Elliott, R. R.* § 1243, note."

**Sec. 768. Action for injury by fire—Measure of damages.** The measure of damages for the destruction of growing trees is the difference in the value of the land before and after the trees were burned. *St. Louis, I. M. & S. Ry. Co. v. Ayres*, 67 Ark. 371 (55 S. W. Rep. 159). In Iowa it is held that the measure of damages for the destruction of a meadow is the value of the growing grass and the cost of restoring the meadow to its former condition; but the measure of damages for the destruction of a hedge fence is the difference between what the property is worth with the hedge and what it is worth without it. *Bradley v. Iowa Cent. Ry. Co.*, 111 Ia. 562 (82 N. W. Rep. 996). The court say: "In *Vermilya v. Railway Co.*, 66 Ia. 606-616 (24 N. W. Rep. 234; 55 Am. Rep. 279), we held that the measure of damages for the destruction of a meadow was the cost of restoring it to its condition before the fire. In *Graessle v. Carpenter*, 70 Ia. 166 (30 N. W. Rep. 392), and *Hamilton v. Railroad Co.*, 84 Ia. 131 (50 N. W. Rep. 567), this rule was confirmed, and these cases have never been questioned, though it is true we have adopted a different rule where trees are destroyed; but we think we shall be able to show that some reason exists for the distinction. The purpose of the law, where one has been injured by the tort of another, is to reimburse



the sufferer for his loss. Where one's meadow has been destroyed he is entitled to recover its value, and how better can its value be ascertained than by finding what it would cost to reproduce or restore it? While there is a conflict in the cases as to the manner in which such damage should be estimated, the rule in this state is not without support in authority. In *Railway Co. v. Jones*, 59 Ark. 105 (26 S. W. Rep. 595), it is held that, where a meadow is destroyed by fire, the measure of damages is the cost of reseeding it, and its rental value until it is restored. This we regard as a more accurate statement of the rule than merely to say that the measure is the cost of the restoration. While this might result in giving plaintiff a better meadow than he lost, defendant cannot complain. It must make good the loss it has occasioned. If it cannot do this without doing something more, the plaintiff should not suffer. Defendant insists the rule by which the damages should be measured is the difference between what the farm was worth with the meadow and what it was worth without it. This is the method, we have held, by which the value of an orchard destroyed should be measured. *Rowe v. Railway Co.*, 102 Ia. 286 (71 N. W. Rep. 409), and cases cited. And it was this rule the trial court applied to the hedge in the case at bar. An objection to this rule with relation to a meadow is that it is always possible to find many witnesses who would value a farm just as high without a meadow as with it, and yet to a man who wants a meadow it certainly has some value. The reason for the distinction this court has made in the manner of estimating the damages for the destruction of a meadow and those for the destruction of trees—and a hedge is to be considered the same as trees—is this: The value of the use during the time lost is an important element. This can be accurately ascertained in the case of a meadow, but cannot as to trees or hedge. How long it will take to get grass in a certain field can be foretold with substantial certainty; how long it will take trees or a hedge to attain a certain size is largely a subject of guess. In any case, it takes so long as to leave too much room for doubtful elements to enter into the calculation. We think the case was tried on the

correct theory as to the measure of damages, both as to the meadow and the hedge."

**Sec. 769. Miscellaneous notes.** A person whose property is threatened with imminent destruction by fire may take such steps for its protection as are reasonable and proper, and, if his acts aid or contribute to the destruction of another's property, he will not be liable as for its negligent destruction; but the fire from which, without negligence, he seeks to protect himself, will be considered as the direct and proximate cause of the loss, and also the cause of his acts. *Owen v. Cook*, 9 N. Dak. 134 (81 N. W. Rep. 285; 47 L. R. A. 646). While one who has placed a building on a railroad right of way for the purpose of using it in connection with and as a part of the railroad system for his own accommodation is not bound to anticipate negligence on the part of the railroad, he is bound to take notice of the unusual and increased risk and to exercise a higher degree of care than if the property were not so placed. *Louisville & N. R. Co. v. Samuels' Ex'rs*, Ky. (57 S. W. Rep. 235).

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## STATUTE OF FRAUDS

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### EPITOME OF CASES.

**Sec. 770. As to what contracts are within the statute of frauds—Parol contracts.** In Louisiana a donation of real estate is null and void, unless executed before a notary and two witnesses, and accepted in express terms by the donee during the lifetime of the donor. *Rowson v. Barbe*, 51 La. Ann. 347 (25 So. Rep. 139). Under the Nebraska statute of frauds (Comp. Stat., ch. 32, § 5) a contract for the sale of lands is void unless it or some note or memorandum thereof is in writing signed by the owner or his agent authorized in writing. *Sowards v. Moss*, 59 Neb. 71 (80 N. W. Rep. 268). A contract to purchase lands

afterwards to be selected by the purchaser is within the statute of frauds, as failing to describe the land, and will, on the purchaser's failure to select, neither support a bill for specific performance nor an action for damages. *Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172 (25 So. Rep. 709; 77 Am. St. Rep. 46). Citing, *Amburger v. Marvin*, 4 E. D. Smith, 393; *Dicken v. McKinley*, 163 Ill. 318 (45 N. E. Rep. 134; 54 Am. St. Rep. 471); *Raub v. Smith* 61 Mich. 543 (28 N. W. Rep. 676; 1 Am. St. Rep. 619); *Wardell v. Williams*, 62 Mich. 50 (28 N. W. Rep. 796; 4 Am. St. Rep. 814); *Yates v. Martin*, 2 Pin. 178; *Hayes v. Burkam*, 51 Ind. 130; *Smith v. Bowler*, 2 Disn. 153; *Pulse v. Hamer*, 8 Or. 251; *Ledford v. Ferrell's Adm'r*, 34 N. C. 285; *Martin v. Wharton*, 38 Ala. 637. Sales of realty under execution or order of court are within the statute of frauds, and a purchaser thereat cannot maintain a suit for specific performance where the officer's return or other written memoranda does not show a sale. *Rugely v. Moore*, 23 Tex. Civ. App. 10 (54 S. W. Rep. 379). Citing, *Maginnis v. Oil Co.*, 47 La. Ann. 1489 (18 So. Rep. 459); *Bozza v. Rowe*, 30 Ill. 198 (83 Am. Dec. 184); *Dawson v. Miller's Adm'r*, 20 Tex. 171 (70 Am. Dec. 380); *Brock v. Jones*, 8 Tex. 79; 2 Freem. Ex., § 299.

A parol agreement to lease land for a term of years is within the statute of frauds of New Hampshire (Pub. Stat., ch. 137, § 12; ch. 215, § 1). *Smith v. Phillips*, 69 N. H. 470 (43 Atl. Rep. 183). A contract for the purchase of an assignment of a written lease is for "an interest in or concerning" land and must be in writing signed by the parties, under the statute of frauds of Maine (Rev. Stat. ch. 111, § 1). *Kingsley v. Siebrecht*, 92 Me. 23 (42 Atl. Rep. 249; 69 Am. St. Rep. 486). An oral postnuptial contract between a husband and wife restoring to her her marital rights in her husband's real estate, which she had relinquished by an antenuptial agreement, under the statute of frauds of Iowa (Code, §§ 4625, 4626), is a contract relating to the "creation of an estate in lands," and is void unless the consideration therefor has been paid in whole or in part; and her condonation of his past wrongs for which she has threatened to sue for divorce is not a sufficient consideration to support such a contract. *Fisher v. Koontz*, 110 Ia. 408 (80 N. W. Rep. 551). Where the

statute of frauds requires a land contract to be in writing the fact that the contract is partly in writing is not sufficient to prevent the operation of the statute. *Wright v. Raftree*, 181 Ill. 464 (54 N. E. Rep. 998). Particular evidence held insufficient to prove an oral agreement by a father to give his son land in consideration of the latter supporting the former. *Chew v. Holt*, 111 Ia. 362 (82 N. W. Rep. 901).

**Sec. 771. As to what contracts are within the statute of frauds—Contract for assignment of certificate of purchase.** A contract for the assignment of a certificate of purchase of real estate at a foreclosure sale is a contract for the transfer of an interest in land and must be in writing. *Cox v. Roberts*, 25 Ind. App. 252 (57 N. E. Rep. 937). The court say: "In *Junkins v. Lovelace*, 72 Ala. 303, it was held that an agreement to redeem from a sale of mortgaged lands under execution, and to allow the mortgagor the benefit of said redemption in case the mortgagor paid the redemptioner the amount expended by him, with interest, is within the statute of frauds, and not enforceable unless in writing. In the case of *Clark v. Condit*, 18 N. J. Eq. 358, it is held that an equity of redemption is such a right or estate in lands as cannot be released or conveyed except in writing. To the same effect was *Van Keuren v. McLaughlin*, 19 N. J. Eq. 187. An agreement which amounts substantially to a transfer of any interest in lands has always been held to be within the statute. *Agnew St. Fr.* p. 151. In the case of *Smith v. Burnham*, 3 Sumn. 435 (Fed. Cas. No. 13019), Justice Story says: 'A contract for the conveyance of lands is a contract respecting an interest in lands. It creates an equitable estate in the vendee in the very land, and makes the vendor a trustee for him. A contract for the sale of the equitable estate in lands, whether it be under a contract for the conveyance by a third person or otherwise, is clearly a sale of the interest in the lands, within the statute of frauds. A partnership to buy contracts for the sale of lands is a partnership for the purchase of an equitable interest in those lands.' In *Whiting v. Butler*, 29 Mich. 122, it is held in an opinion of Justice Cooley, that the equitable interest in lands acquired by

the purchaser at an execution sale was an interest capable of assignment and sale, but the contract for such sale or assignment was within the statute of frauds, and, to be enforceable, must be in writing. See, also, *Grover v. Buck*, 34 Mich. 519. In the case of *Daniels v. Bailey*, 43 Wis. 566, it is held that the sale of an interest in a certificate of sale of standing timber is a sale of an interest in land, and, if by parol, is void by the statute of frauds."

**Sec. 772. What contracts are not within the statute of frauds.** Dower may be assigned by a parol agreement, *Pearce v. Pearce*, 184 Ill. 289 (56 N. E. Rep. 311); and a husband cannot invoke the statute of frauds to defeat a prior parol antenuptial contract to convey land to his wife, in the absence of which she would not have entered into the marriage contract with him, *Moore v. Allen*, 26 Colo. 197 (57 Pac. Rep. 698; 77 Am. St. Rep. 255). A parol agreement among persons holding real estate as partners to sell it and divide the proceeds is not void under the statute of frauds. *Van Housen v. Copeland*, 189 Ill. 74 (54 N. E. Rep. 169). The statute does not apply to a contract to submit to arbitration where the only question involved is the amount to be paid for land already taken, and a conveyance of which could be compelled. *Hewitt v. Lehigh & H. Ry. Co.*, 57 N. J. Eq. 511 (42 Atl. Rep. 325). An agreement between two persons to purchase land jointly from another is not within the statute of frauds. *Simon v. Gulick*, Ky. (50 S. W. Rep. 992; 21 Ky. Law Rep. 104). The statute of frauds of North Carolina (Code, § 1554) requires only contracts to "sell and convey" lands or interest therein to be in writing, and hence a verbal agreement to release a mortgage is not within the statute. *Hemmings v. Doss*, 125 N. C. 400 (34 S. E. Rep. 511).

**Sec. 773. Sufficiency of memorandum.** The memorandum must contain a sufficient description of the land. *Ray v. Card*, 21 R. I. 362 (43 Atl. Rep. 846). In order to constitute a sufficient memorandum under the statute of frauds, the subject matter of the contract must be so certainly described that no oral testimony is needed to supply any necessary terms or conditions. See opinion as to

the sufficiency of particular memorandum of a contract for the assignment of a lease. *Kingsley v. Siebrecht*, 92 Me. 23 (42 Atl. Rep. 249; 69 Am. St. Rep. 486). A writing is not sufficient to satisfy the statute of frauds (Utah Rev. Stat. 1898, § 2467), unless the essential terms of the contract between the parties can be determined from it; and if it is thus defective the defect cannot be supplied by parol proof. *Abba v. Smyth*, 21 Utah 109 (59 Pac. Rep. 756). Where the only memorandum of an alleged agreement to take a lease was a written offer which subsequently was amended by a telephone communication between the parties, and thus accepted as amended, the agreement is within the statute of frauds. *Weissner v. Ayer*, 176 Mass. 425 (57 N. E. Rep. 672). An indorsement made and signed by a lessor of a lease in his possession, extending it for a period of five years, executed when his lessee requested a renewal of the lease in order that he might make extensive expenditures on the property, accompanied by the lessee's acceptance of the renewal and followed by extensive improvements, is valid within the statute of frauds. *Whitman v. City of Reading*, 191 Pa. St. 134 (43 Atl. Rep. 140). Particular papers held to constitute sufficient memorandum for a contract for the sale of land. *Hibbard v. Hatch Storage-Battery Co.*, 174 Mass. 296 (54 N. E. Rep. 658).

**Sec. 774. Part performance—General principles.**

After a parol contract affecting real estate has been fully performed a party to it cannot set up its invalidity under the statute of frauds. *Gerber v. Upton*, 123 Mich. 605 (82 N. W. Rep. 363). Part performance of a contract relating to the sale of land, invalid because not in writing, takes it out of the statute to the extent of authorizing a court of equity to enforce the specific performance between the parties, where it can be done equitably, but such contract does not become valid through part performance, so that it will support an action for its breach. *Hallett v. Gordon*, 122 Mich. 567 (81 N. W. Rep. 556). Part performance of an agreement to lease land for a term of years does not take the contract out of the statute, so as to authorize a recovery of damages in an action at law for a breach of the oral contract. *Smith v. Phillips*, 69

N. H. 470 (43 Atl. Rep. 183). Citing, *Webster v. Blodgett*, 59 N. H. 120; *Lane v. Shackford*, 5 N. H. 130, 133; *Ayer v. Hawkes*, 11 N. H. 148, 150; *Emery v. Smith*, 46 N. H. 151, 155; *Kidder v. Hunt*, 1 Pick. 328; *Thompson v. Gould*, 20 Pick. 134, 138; *Adams v. Townsend*, 1 Metc. (Mass.) 483; *Hibbard v. Whitney*, 13 Vt. 21, 24; *Hawley v. Moody*, 24 Vt. 603, 605; *Buck v. Pickwell*, 27 Vt. 157, 166, 167; *Abbott v. Draper*, 4 Denio, 51, 53; *Eaton v. Whitaker*, 18 Conn. 222, 231 (44 Am. Dec. 586); *Chit. Cont.* (10th Am. Ed.) 329; 2 *Pars. Cont.* (4th Ed.), § 340; *Browne, St. Frauds* (5th Ed.), § 451.

In order for acts of part performance of a contract to operate to defeat the statute of frauds it must appear that they were done under the contract itself, and for the purpose of performing it. *Wright v. Raftree*, 181 Ill. 464 (54 N. E. Rep. 998); *Alexander v. Alexander*, 150 Mo. 579 (52 S. W. Rep. 256); *Anderson v. Schneider*, 22 Wash. 363 (60 Pac. Rep. 1125). One seeking specific performance of a parol contract on the ground of its part performance must rely upon his own acts of part performance, and not upon the repudiated acts of the defendants. *Huntington & K. Land Dev. Co. v. Thornburg*, 46 W. Va. 99 (33 S. E. Rep. 108). Performance may be proved by parol evidence. *Abba v. Smyth*, 21 Utah, 109 (59 Pac. Rep. 756). A division of the rents between the parties and a payment by the vendee of a part of the cost of improvements after the making of a contract for the sale of land is a sufficient part performance to take it out of the statute of frauds. *Shearer v. Gibson*, 123 Mich. 467 (82 N. W. Rep. 206).

**Sec. 775. Part performance—Payment of purchase price—Taking possession and making improvements.** The payment of the purchase price, taking possession and making valuable improvements is sufficient to take an oral contract to convey land out of the statute of frauds. *Low v. Low*, 173 Mass. 580 (54 N. E. Rep. 257). In New Hampshire the mere payment of the agreed purchase price for land does not take the contract for its sale out of the statute of frauds. *Brown v. Drew*, 67 N. H. 569 (42 Atl. Rep. 177). But taking possession of land and making valuable improvements thereon on the faith of the con-

tract of purchase is sufficient. *Stillings v. Stillings*, 67 N. H. 584 (42 Atl. Rep. 271). In North Carolina a parol contract to convey land is not taken out of the statute of frauds by the vendee paying the purchase price, taking possession and making improvements; but a vendor repudiating such a contract cannot recover the land without returning the purchase price and accounting for the improvements. *Pass v. Brooks*, 125 N. C. 129 (34 S. E. Rep. 228). In South Carolina a parol contract for the sale of land may be taken out of the statute of frauds by part performance. *Alexander v. McDaniel*, 56 S. C. 252 (34 S. E. Rep. 405). In Arkansas possession obtained solely under a parol contract of sale is sufficient to take it out of the statute of frauds. *Cooper v. Newton*, 68 Ark. 150 (56 S. W. Rep. 867). Taking possession and making improvements under a contract evidenced only by a receipt for the purchase price is sufficient part performance to take the contract out of the statute of frauds. *Fee v. Sharkey*, 59 N. J. Eq. 284 (44 Atl. Rep. 673). Actual, and not constructive possession is necessary to take a parol contract out of the statute of frauds. *Huntington & K. Land Dev. Co. v. Thornburg*, 46 W. Va. 99 (33 S. E. Rep. 108). A verbal agreement by a father with his child to convey to such child a tract of land if the latter will enter and live upon it and improve it, may be enforced specifically where the child enters upon the land in reliance upon the promise and makes lasting and valuable improvements. *Sanford v. Davis*, 181 Ill. 570 (54 N. E. Rep. 977). To the same effect is the case of *Pike v. Pike*, 121 Mich. 170 (80 N. W. Rep. 5; 80 Am. St. Rep. 488). *Schwindt v. Schwindt*, 61 Kan. 377 (59 Pac. Rep. 647). A parol contract by which a father agrees to give his daughter a certain parcel of land in consideration of her paying to him a certain annuity and boarding him a certain period each year, during his life, is taken out of the statute of frauds where she and her husband enter into possession of the land, make permanent improvements thereon and perform or offer to perform her obligations under the contract. *Epps v. Story*, 109 Ga. 302 (34 S. E. Rep. 662).



**Sec. 776. Miscellaneous notes.** The statute of frauds must be pleaded specially when relied upon as a defense, *Gregory v. Ferris*, Tenn. (56 S. W. Rep. 1059); and the right to plead the statute is a personal privilege which may be waived, *Abba v. Smyth*, 21 Utah, 109 (59 Pac. Rep. 756). For exhaustive collation of authorities on "When and how the statute of frauds must be pleaded," see 78 Am. St. Rep. 648-657; 86 Am. Dec. 684-688. Where a contract is not enforceable between the parties on account of the statute of frauds, no action for damages for refusing to execute it or to reduce it to writing can be maintained. *Hurley v. Woodsides*, Ky. (54 S. W. Rep. 8; 21 Ky. Law Rep. 1073). Where a lessee in a written lease of rooms for city offices for a specified number of years, by parol agreement with his lessor, exchanges some of the rooms for others, without any agreement as to how long the lease shall continue, the contract thereby becomes one in parol. *City of Michigan City v. Leeds*, 24 Ind. App. 271 (55 N. E. Rep. 799).

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## STATUTE OF LIMITATIONS

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### EPITOME OF CASES.

**Sec. 777. Application of statute of limitations—General principles.** One cannot maintain an action to cancel a conveyance where he is barred by the statute of limitations from recovering the land itself. *McCann v. Welch*, 106 Wis. 142 (81 N. W. Rep. 996). An action by a grantor to recover lands which he has conveyed to secure the payment of a debt, in effect is an action to redeem, and is barred by the same lapse of time from the date the debt secured is due as would bar an action to foreclose. *Adams v. Holden*, 111 Ia. 54 (82 N. W. Rep. 468). The statute of limitations may be pleaded in bar of an action for damages by one who was induced to purchase land by the fraudulent representations of his vendor, where the char-

acter of the representations were of such nature as to put him on inquiry as to their falsity. *Archer v. Freeman*, 124 Cal. 528 (57 Pac. Rep. 474). The statute of limitations may be pleaded as a bar to an action by a county against its grantor for a breach of his covenant against incumbrances. *Shelby Co. v. Bickford*, 102 Tenn. 395 (52 S. W. Rep. 772). The court say: "This action is not by the county to recover taxes, quasi taxes, but to recover an indebtedness which it claims by virtue of a contractual relation between it and defendants. It is not brought by the county, in its delegated sovereign capacity, for the recovery of any revenue due it by imposition of its sovereign will, but as an individual sues another individual for an ordinary breach of contract. It is well settled that in such cases, where the government enters into trading relations or litigation, it divests itself of all sovereignty, and loses its exemption. *The Siren*, 7 Wall. 154; *United States Bank v. Planters' Bank of Georgia*, 9 Wheat. 907; *Schaumburg v. United States*, 103 U. S. 667; *Moore v. Tate*, 87 Tenn. 729 (11 S. W. Rep. 935; 10 Am. St. Rep. 712); *State v. Ward*, 9 Heisk. 111; *Ang. Lim.* 41; *Calloway v. Cosart*, 45 Ark. 81."

**Sec 778. As to when the statute begins to run.** The statute of limitation does not begin to run against an action for possession by a remainderman until the death of the life tenant. *Jeffries v. Butler*, Ky. (56 S. W. Rep. 979). Limitations do not commence to run against the children of a deceased husband until the death of his widow, where they do not acquire any title until that time. *Bell v. Shaffer*, 154 Ind. 413 (56 N. E. Rep. 217). As between the parties to an absolute deed given as a mortgage, the statute of limitations begins to run against the debt from the decree converting the deed into a mortgage. *Paris v. Poss*, 104 Tenn. 122 (56 S. W. Rep. 835); *Savage v. Gaut*, Tenn. (57 S. W. Rep. 170). Where it does not appear that any time was fixed for the payment of a loan, to secure which a deed intended as a mortgage was given, it will be presumed to be due immediately or on demand, for the purpose of determining when the statute of limitations begins to run. *Newhall v. Sherman*, 124 Cal. 509 (57 Pac. Rep. 387). The statute

of limitations begins to run against an action by a vendee to recover on account of a deficiency in the quantity of land conveyed, from the time of his making the last payment on the purchase price. *Nave v. Price*, Ky. (55 S. W. Rep. 882; 21 Ky. Law Rep. 1538). The statute of limitations does not begin to run against the right of a grantee in a defective deed to have it reformed until the grantor makes some assertion of adverse claim thereunder. *State v. Lorenz*, 22 Wash, 289 (60 Pac. Rep. 644). An ancestor's knowledge that an absolute deed executed by him in fact was a mortgage is not imputable to his heirs or devisees so as to start the statute of limitations running against them before actual knowledge on their part of the true nature of the deed. *Rice v. Ward*, 92 Tex. 704 (51 S. W. Rep. 844). Construing and applying Ia. Code, § 3447, subd. 6, providing that an action for relief on the ground of fraud must be brought within five years after the action accrued, it is held that an action by a debtor to set aside an absolute conveyance made and recorded by his creditor of land conveyed to the latter as security, in violation of an agreement between them, must be brought within five years from the recording of the deed, as its recording constitutes constructive notice to the debtor, though a nonresident. *Clark v. Van Loon*, 108 Ia. 250 (79 N. W. Rep. 88; 75 Am. St. Rep. 219).

**Sec. 779. Interruption or suspension of statute—Payments or recognition of title.** In California it is held that where two notes held by different parties are secured by the same conveyance which recognized a priority in favor of the older note, the holder thereof, by the taking of a new note from the common debtor thus extending the time of payment, cannot extend the limitation so as to affect the second mortgagee, but the latter may take advantage of limitations on the first mortgage debt, though the debtor does not. *California Bank v. Brooks*, 126 Cal. 198 (59 Pac. Rep. 302). In Kansas it is held that the making of interest payments by the grantee of mortgaged premises operates to suspend the running of the statute of limitations against the foreclosure of the mortgage lien. *Neosho Val. Inv. Co. v. Huston*, 61 Kan. 859 (59 Pac. Rep. 643), following *McLane v. McAllison* 60 Kan. 441 (56 Pac.

Rep. 747). Payments made on a mortgage debt by a subsequent grantee of the premises who, by his covenant of assumption has become personally liable therefor, operate to arrest the running of the statute of limitations against him. *Harts v. Emery*, 184 Ill. 560 (56 N. E. Rep. 865). A covenant by the grantee of mortgaged premises by which he assumes the payment of the mortgage debt constitutes a new promise in writing and starts the statute of limitations running anew and of which the mortgagee can avail himself. *Daniels v. Johnson*, 129 Cal. 415 (61 Pac. Rep. 1107; 79 Am. St. Rep. 123). The fact that a grantee of land in possession thereof under an absolute deed intended as a mortgage, applies the rents and profits thereof to the payment of the debt secured, will not operate to take a suit by the grantor to recover the land from the bar of the statute of limitations, such grantor having made no voluntary payment. *Adams v. Holden*, 111 Ia. 64 (82 N. W. Rep. 468). Payments on purchase-money notes secured by a vendor's lien, made after the debtor has executed a deed or mortgage of the land, will not, as against the grantee or mortgagee, extend the lien beyond the time for which it would otherwise continue, although they extend the statutory bar with respect to the notes, and the lien, as against the debtor himself, being only an incident of the debt, continues as long as the debt is not barred; but an extension of the time of a vendor's lien by payments made by the debtor on notes secured thereby, which interrupt the statute of limitations as to the notes, will operate against his subsequent vendees or mortgagees, as well as against him, whether they have any notice of the payments or not. *Cook v. Union Trust Co.*, Ky. (51 S. W. Rep. 600; 45 L. R. A. 212; 21 Ky. Law Rep. 454). An acknowledgment of the mortgage indebtedness by the owner of the mortgaged premises contained in an agreement for an extension made by him with the mortgagee after he had parted with all interest in the mortgage, will not interrupt the running of the statute of limitations on the mortgage, as against a purchaser from the maker of such agreement. *Investment Securities Co. v. Bergthold*, 60 Kan. 813 (58 Pac. Rep. 469). The taking of a lease from the holder of the legal title by one in possession of the land claiming to hold adverse-

ly, constitutes such admission of ownership in another as to interrupt the running of the statute of limitations. *Chicago & A. R. Co. v. Keegan*, 185 Ill. 70 (56 N. E. Rep. 1088).

**Sec. 780. Interruption or suspension of statute—Disabilities—Absence of defendant from state.** The disability of coverture cannot be added to that of infancy to prevent the running of the statute of limitations. *Buttery v. Brown*, Tenn. (52 S. W. Rep. 713). Neither can the disability of unsoundness of mind. *Sharp v. Stephens' Committee*, Ky. (52 S. W. Rep. 977; 21 Ky. Law Rep. 687). Where a statute of limitations (Mansf. Ark. Dig., § 4476) has commenced to run against an adult, it will continue to run against his minor heirs upon his death. *Murray v. Houghton*, Ind. Ter. (52 S. W. Rep. 48). Ky Stat., § 2506, giving an infant three years after his disability is removed in which to bring an action to recover real property does not extend the period of limitation where the disability has been removed more than three years before the expiration of the period allowed by the statute for bringing such an action. *Sharp v. Stephens' Committee*, Ky. (52 S. W. Rep. 977; 21 Ky. Law Rep. 687).

In discussing to what extent a foreign corporation will be deemed a "person out of the state" within the meaning of a statute (1 Hill's Ann. Or. Laws, § 16), providing that absence or concealment of the defendant shall prevent the running of the statute of limitations, in the case of *Burns v. White Swan Min. Co.*, 35 Or. 305 (57 Pac. Rep. 637), the supreme court of Oregon say: "In *Larson v. Aultman & Taylor Co.*, 86 Wis. 281 (56 N. W. Rep. 915; 39 Am. St. Rep. 893), it was held that a foreign corporation is a 'person out of the state,' within the meaning of the statute of Wisconsin which provided that 'if, when the cause of action shall accrue against any person, he shall be out of this state, such action may be commenced within the terms herein respectively limited, after such person shall return or remove to this state.' Mr. Justice Cassoday, in rendering the decision of the court, says: 'It is conceded that the defendant is a corporation created and organized under the laws of Ohio. It exists

only in contemplation, and by force of, the law of that state. Since such law has, of itself, no extraterritorial force, the corporation cannot migrate to another state, but must dwell in the state of its creation.' To the effect that a foreign corporation is a 'person out of the state,' see, also, *Insurance Co. v. Fricke*, 99 Wis. 367 (74 N. W. Rep. 372; 41 L. R. A. 557); *Dry-Goods Co. v. Cornell*, 4 Okla. 412 (46 Pac. Rep. 860). In *Olcott v. Railroad Co.*, 20 N. Y. 210 (75 Am. Dec. 393), under a statute of New York identical with 1 Hill's Ann. Or. Laws, § 16, it was held that a foreign corporation sued in that state could not plead the statute of limitations in bar of an action. And this rule has been followed in Nevada. *Robinson v. Mining Co.*, 5 Nev. 44; *State v. Central Pac. R. Co.*, 10 Nev. 47; *Barstow v. Mining Co.*, 10 Nev. 386. The more modern rule, however, and the one most consonant with reason, is that a foreign corporation doing business within a state may plead the statute of limitations in bar of an action instituted therein, when it maintains an agent within such state upon whom service of process can be made for it. *Huss v. Railroad Co.*, 66 Ala. 472; *Lawrence v. Ballou*, 50 Cal. 258; *Pennsylvania Co. v. Sloan*, 1 Ill. App. 364; *Koons v. Railway Co.*, 23 Ia. 493; *Cobb v. Railway Co.*, 38 Ia. 601; *Winney v. Manufacturing Co.*, Ia. (50 N. W. Rep. 565); *King v. Exploring Co.*, 4 Mont. 1 (1 Pac. Rep. 727). The reason for this latter rule undoubtedly is that a debtor out of the state cannot impute laches to his creditors, or those claiming to have rights of action against him, in not pursuing their remedies in a foreign jurisdiction; but, when this excuse is rendered unavailing by the debtor's coming into the state, the obligation upon their part to use the required diligence attaches; and a foreign corporation 'returns' to the state, within the meaning of statutes of limitation, when it establishes an agent therein upon whom process can be served as its representative."

**Sec. 781. Laches—General Principles.** A suit to enforce the collection of taxes may be lost by laches. *Robinson v. Bierce*, 102 Tenn. 428 (52 S. W. Rep. 992; 47 L. R. A. 275). Laches will not run as against an owner in possession until his title is attacked. *Shaw v. Allen*. 184

Ill. 77 (56 N. E. Rep. 403); *Henderson v. Harness*, 184 Ill. 520 (56 N. E. Rep. 786); *Gordon v. Johnson*, 186 Ill. 18 (57 N. E. Rep. 790). Substantially the same is held in *Owen v. Williams*, Tenn. (55 S. W. Rep. 18). Laches for a less period than that prescribed by the statute of limitations may bar a right to relief in equity. *McMillan v. McMillan*, 184 Ill. 230 (56 N. E. Rep. 302). An equitable action to cancel a deed will be held to be barred although the statute of limitations applicable to actions to recover real estate is not pleaded, where it appears that a greater length of time has elapsed than the period prescribed by statute since the plaintiff's cause of action accrued, during which he has conducted himself in such a manner as to leave the impression that he did not question the conveyance, and death and insanity have removed some of the important adverse witnesses to the transaction and the defendants have assumed contractual burdens which presumably they would not had the plaintiff made timely assertion of his claim. *McCann v. Welch*, 106 Wis. 142 (81 N. W. Rep. 996). The right of one in possession of land to cancel a conveyance thereof on account of fraud is not barred by his laches where it does not appear that he ever surrendered possession under the deed or recognized the grantee's title. *Treadwell v. Torbert*, 122 Ala. 297 (25 So. Rep. 216). Failure of a cestui que trust promptly to relieve from his burden one whom the law holds to be a trustee of property bought by him on foreclosure will not constitute laches, where the trustee makes the purchase voluntarily and denies the other's interest in the property, merely offering to allow him to redeem within eight days. *Kimball v. Ranney*, 122 Mich. 160 (80 N. W. Rep. 992; 46 L. R. A. 403; 80 Am. St. Rep. 548).

**Sec. 782. Laches—Particular cases.** A grantor's right to assert that certain land was not embraced in his deed is lost by laches where, for more than twenty-five years, he permits his grantee to hold possession of the land, make improvements and pay taxes thereon and exercise acts of ownership over it, although he did not actually occupy it. *Chezum v. McBride*, 21 Wash. 558 (58 Pac. Rep. 1067). Where one placed in possession of

land deeded by mistake to his father who died shortly thereafter, was acquainted with all the facts and failed for more than sixteen years to assert any claim to the land, during which time he had ample opportunity to litigate his rights, having been made a party to proceedings by the devisees of the father to sell the real estate, he is barred by laches from asserting any title thereto. *Anderson v. Anderson*, 89 Md. 1 (42 Atl. Rep. 207). One claiming a conveyance to be fraudulent as to creditors who, with notice of all the facts, for more than three years acquiescence in the purchaser making extensive improvements on the property without questioning his title, is guilty of such laches as bars his right to have the conveyance set aside. *Hamilton v. Menominee Falls Quarry Co.*, 106 Wis. 352 (81 N. W. Rep. 876). An heir who permits his step-mother to continue in possession of lands which she holds in trust for him and other heirs, on account of her purchase thereof with funds belonging to his father's estate, and to appropriate its rents and profits for the necessary support of herself and minor children for a period of eight or nine years after he becomes of age, without demanding or bringing action for his interest therein, is not guilty of sufficient laches to bar such an action. *Zunkel v. Colson*, 109 Ia. 695 (81 N. W. Rep. 175). For particular fact cases illustrating the application of the doctrine of laches, see *Four Mile Land & Coal Co. v. Gibson*, Ky. (49 S. W. Rep. 954; 20 Ky. Law Rep. 1670); *French v. French*, Tenn. (52 S. W. Rep. 517); *Brunner v. Warner*, Tenn. (52 S. W. Rep. 668); *Joyce v. Grownney*, 154 Mo. 253 (55 S. W. Rep. 466); *Decatur Mineral & Land Co. v. Friedman*, Ky. (56 S. W. Rep. 11; 21 Ky. Law Rep. 1642); *Loomis v. Rosenthal*, 34 Or. 585 (57 Pac. Rep. 55); *Benson v. Dempster*, 183 Ill. 297 (55 N. E. Rep. 651).

**Sec. 783. Statute of limitations as applied to trusts.**

When the trustee who has the legal title and the sole right to sue for possession, is barred, the cestui que trust, though a minor or married woman, likewise is barred. *Schiffman v. Schmidt*, 154 Mo. 204 (55 S. W. Rep. 451); *Simpson v. Erisner*, 155 Mo. 157 (55 S. W. Rep. 1029). In Alabama the statute of limitations begins to run against



the enforcement of a constructive trust upon the instant of its coming into being, where the party seeking to enforce the trust has knowledge of all the facts. *Bracken v. Newman*, 121 Ala. 311 (26 So. Rep. 3). Time begins to run against an express trust only from the time a breach, disavowal or repudiation thereof by the trustee is made known to the cestui que trust. *In re Welles' Estate*, 79 Minn. 53 (81 N. W. Rep. 549). The statute of limitations does not begin to run in favor of a trustee against his beneficiary until the trustee in some unmistakable manner gives the beneficiary sufficient notice or sufficient reason to know that he claims the property adversely to him; the mere execution of a mortgage by the trustee for the benefit of the estate and which is soon satisfied, or the giving to a third person an option to buy minerals under the land which was not accepted, do not constitute such adverse possession against the beneficiary as will set the statute in motion. *Zunkel v. Colson*, 109 Ia. 695 (81 N. W. Rep. 175).

**Sec. 784. Pleading statute of limitations.** Applying the rule that the plea of the statute of limitations is a personal defense, it is held that where a suit in equity is brought by a judgment creditor to subject the lands of the debtor to the satisfaction of his judgment, and the plaintiff in the bill sets forth the fact that there is another judgment against the same defendant, older in point of time, but which has not been kept alive by issuing executions as required by statute, but the defendant is in life, and does not plead the statute of limitations as to said older judgment, the plaintiff in said suit in equity has no right to file or rely on such plea. *Welton v. Boggs*, 45 W. Va. 620 (32 S. E. Rep. 232; 72 Am. St. Rep. 833). Where the reason given by a plaintiff in an action to recover for a deficiency in the quantity of land conveyed to him by another, resulting from the fraud or mistake of his vendor, shows that he did not use due diligence to ascertain the quantity of land conveyed, the defendant, in pleading the statute of limitations, need not aver that the plaintiff might have discovered the mistake sooner by the exercise of ordinary diligence. *Nave v. Price*, Ky. (55 S. W. Rep. 882; 21 Ky. Law Rep. 1538). Cal.

Code Civ. Proc., § 458 construed and applied—pleading statute of limitations. *Nicholson v. Tarpey*, 124 Cal. 442 (57 Pac. Rep. 457). Utah Rev. Stat. 1898, § 2992 construed and applied—pleading statute of limitations. *Snow v. Rich*, 22 Utah, 123 (61 Pac. Rep. 336).

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### STATUTORY PROVISIONS.

[In Vol. V, §§ 841-888; Vol. VI, §§ 868-885; Vol. VII, §§ 768-781, will be found a compilation of the statutory provisions of the several states and territories concerning the limitations of the various actions affecting real estate. Below we give such amendments, changes and additional constructions as have been made.]

#### **Sec. 785. Arkansas.**

(See Vol. V, § 843; Vol. VI, § 866; Vol. VII, § 768.) Mansf. Dig., § 4476, precluding recovery of land by a plaintiff out of possession for more than five years, construed and applied. *Murray v. Houghton*, 2 Ind. Ter. 504 (52 S. W. Rep. 48); *Robinson v. Nail*, 2 Ind. Ter. 509 (52 S. W. Rep. 49); Sand & H. Dig., § 4815, limiting the time for bringing an action for the recovery of land to seven years, does not apply to a married woman until three years after discoveriture. *Rowland v. McGuire*, 67 Ark. 320 (55 S. W. Rep. 16); *Cooper v. Newton*, 68 Ark. 150 (56 S. W. Rep. 867). Ark. Laws 1873, Act Apr. 28, authorizing married women to sue alone and in their own names, does not repeal by implication the saving clause in their favor in the statute of limitations (Sand. & H. Ark. Dig., § 4815) giving a married woman three years after discoveriture in which to bring an action for lands. *Memphis & L. R. R. Co. v. Organ*, 67 Ark. 84 (55 S. W. Rep. 952). Sand. & H. Dig. § 4819 construed and applied—limitation upon action to recover lands held under a donation deed. *Hagerman v. Moon*, 68 Ark. 279 (57 S. W. Rep. 935).

#### **Sec. 786. California.**

(See Vol. V, § 844; Vol. VI, § 867; Vol. VII, § 769.) Under Code Civ. Proc., § 338, subd. 2, an action for trespass upon real property is barred in three years. *Robinson v. Southern Cal. Ry. Co.*, 129 Cal. 8 (61 Pac. Rep. 947). Code Civ. Proc., § 1573 construed and applied—three year limitation upon action to recover real estate sold at administrator's sale. *Campbell v. Drais*, 125 Cal. 253 (57 Pac. Rep. 994).

**Sec. 787. Florida.**

(See Vol. V, § 848; Vol. VI, § 868.) Seven years adverse possession of land, based upon a paper title, not good as an independent conveyance, but sufficient to constitute a basis of adverse holding, is not the period of limitation prescribed by the statute to defeat a mortgage claim, but twenty years is the prescribed period, and applies whether the adverse holder claims under title from the mortgagor, or under an independent source of title. *Coe v. Finlayson*, 41 Fla. 169 (26 So. Rep. 704).

**Sec. 788. Illinois.**

(See Vol. V, § 851.) Rev. Stat., ch. 83, § 4 construed and applied—seven-year limitation upon action to recover land. *Catlin Coal Co. v. Lloyd*, 180 Ill. 398 (54 N. E. Rep. 214; 72 Am. St. Rep. 216).

**Sec. 789. Indiana.**

(See Vol. V, § 852; Vol. VI, § 869). Under Rev. Stat. 1894, § 294, cl. 4 (Rev. Stat. 1901, § 294, cl. 4), an action to recover real property sold to pay the debts of a decedent, brought by a party to the proceeding, is barred in five years from the confirmation of the sale, although the sale was void. *Armstrong v. Hufty*, 156 Ind. 606 (55 N. E. Rep. 443). See opinion for discussion of this statute.

**Sec. 790. Iowa.**

(See Vol. V, § 853.) Code 1873, §§ 2251, 2261 construed and applied—limitation of action on guardian's bond. *Ackerman v. Hilpert*, 108 Ia. 247 (79 N. W. Rep. 90). Construing and applying Ia. Code, § 3447, subd. 6, providing that an action for relief on the ground of fraud must be brought within five years after the action accrued, it is held that an action by a debtor to set aside an absolute conveyance made and recorded by his creditor of land conveyed to the latter as a security, in violation of an agreement between them, must be brought within five years from the recording of the deed, as its recording constitutes constructive notice to the debtor, though a non-resident. *Clark v. Van Loon*, 108 Ia. 250 (79 N. W. Rep. 88; 75 Am. St. Rep. 219).

**Sec. 791. Kentucky.**

(See Vol. V, § 855; Vol. VII, § 772). Under Stat., § 2519, an action to set aside a deed as fraudulent must be brought within ten years from the time it was made and recorded. *Blake v. Wolfe*, Ky. (49 S. W. Rep. 19; 20 Ky. Law Rep. 1212). Under Stat., § 2515, an action to enforce a parol agreement to permit one to redeem from a sale made under a bankruptcy proceedings cannot be maintained

after a lapse of five years; and under § 2519, in no event can an action to cancel a deed for fraud or mistake be maintained after a lapse of ten years from the making of the deed. *Buckler's Adm'x v. Rogers*, Ky. (53 S. W. Rep. 529). Stat., § 2515 construed and applied—action for relief on ground of fraud or mistake barred in five years. *Nave v. Price*, Ky. (55 S. W. Rep. 882; 21 Ky. Law Rep. 1538). Stat., § 2519 applied—action for relief from fraud or mistake barred in ten years. *Elam v. Haden*, Ky. (51 S. W. Rep. 455); *Nave v. Price*, Ky. (55 S. W. Rep. 882; 21 Ky. Law Rep. 1538). As to when an action for damages on account of the construction of a railroad in a street is barred, see *Klosterman v. Chesapeake & O. Ry. Co.*, Ky. (56 S. W. Rep. 820); *Trustees Common-School Dist. No. 14 v. Nashville, C. & St. L. R. Co.*, Ky. (56 S. W. Rep. 990); *Ferguson v. Covington & C. El. R. T. & B. Co.*, Ky. (57 S. W. Rep. 460). Stat., § 2525 construed and applied—exception of married women from the operation of the statute of limitation. *Onions v. Covington & C. El. R. T. & B. Co.*, Ky. (53 S. W. Rep. 8; 21 Ky. Law Rep. 820). Stat., § 2506 construed and applied—extension of period on account of disability of infancy. *Sharp v. Stephens' Committee*, Ky. (52 S. W. Rep. 677; 21 Ky. Law Rep. 687).

#### **Sec. 792. Michigan.**

(See Vol. V, § 860; Vol. VI, § 872.) How. Ann. Stat., § 8698, subd. 1, which bars a right of entry, after lapse of five years, against one occupying under a deed from a ministerial officer from a court of competent jurisdiction within the state, applies to one occupying under a deed by an assignee in bankruptcy in proceedings in a federal court within the state. *Potter v. Martin*, 122 Mich. 542 (81 N. W. Rep. 424). Comp. Laws 1857, § 3119, as amended by Laws 1867, No. 95, construed and applied—limitation upon action by judgment creditor to determine his debtor's rights in lands fraudulently conveyed by him and levied upon by the judgment creditor. *Daniel v. Palmer*, Mich. (82 N. W. Rep. 1067).

#### **Sec. 793. Montana.**

(See Vol. V, § 864). "An action for trespass upon real property" must be brought within five years. Laws 1901, p. 157.

#### **Sec. 794. Nebraska.**

(See Vol. V, § 865; Vol. VI, § 876; Vol. VII, § 775.) Laws 1895, ch. 224 construed and applied—five-year limitation upon action to recover damages to real property. *Ridley v. Seaboard & R. R. Co.*, 124 N. C. 34 (32 S. E. Rep. 325).

**Sec. 795. Ohio.**

(See Vol. V, § 873; Vol. VII, § 778.) As to what statute applies to an action for a deficiency arising upon foreclosure of a mortgage, see *Doyle v. West*, 60 O. St. 438 (54 N. E. Rep. 469).

**Sec. 796. Oregon.**

(See Vol. V, § 875; Vol. VI, § 880.) Under Hill's Ann. Laws, § 4, no action can be maintained for the recovery of real estate "unless it appear that the plaintiff, his ancestor, predecessor or grantor was seized or possessed within ten years before the commencement of said action," and by § 18 this is made applicable to actions brought in the name of the state or any county or other public corporation therein. *Schneider v. Hutchinson*, 35 Or. 253 (57 Pac. Rep. 324; 76 Am. St. Rep. 474). For further construction of § 4, see second section in chapter on Adverse Possession.

**Sec. 797. Tennessee.**

(See Vol. V, § 880; Vol. VII, § 779.) Shannon's Code, § 1867 construed and applied—limitation upon action to recover for the taking of property for some work of internal improvement. *City of Memphis v. Wait*, 102 Tenn. 274 (52 S. W. Rep. 161).

**Sec. 798. Texas.**

(See Vol. V, § 881; Vol. VI, § 882). An action to establish a lost or concealed deed of trust is not one for the recovery of land and is not governed by the statute prescribing limitations for such actions, but by Rev. Stat., § 8358. *Farmers' L. & T. Co. v. Beckley*, 93 Tex. 267 (54 S. W. Rep. 1027).

**Sec. 799. West Virginia.**

(See Vol. V, § 886; Vol. VI, § 884.) A wife's right to recover dower is barred in ten years from the death of her husband. *Morris v. Roseberry*, 46 W. Va. 24 (32 S. E. Rep. 1019). Under Code, ch. 104, § 14, an action to set aside a voluntary conveyance must be brought within five years after the execution and delivery of the deed. *Thorn v. Sprouse*, 46 W. Va. 225 (33 S. E. Rep. 99).

**Sec. 800. Wyoming.**

(See Vol. V, § 888.) Rev. Stat. 1887, § 2366, providing limitations as to actions to recover real estate does not apply to an action to foreclose a mortgage, but such action does not become barred until an action on the debt is barred. *Balch v. Arnold*, Wyo. (59 Pac. Rep. 434).

# SURFACE WATER

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## EPITOME OF CASES.

**Sec. 801. What constitutes surface water.** Surface water is water of casual, vagrant character, oozing through the soil, or diffusing and squandering over or under the surface, which, though usually and naturally flowing in known direction, has no banks or channel cut in the soil; coming from rain and snow, and occasional outbursts in time of freshet, descending from mountains or hills and inundating the country; and the moisture of wet, spongy, springy or boggy land. *Neal v. Ohio River R. Co.*, 47 W. Va. 316 (34 S. E. Rep. 914). Overflow from a lake fed by a running stream is not surface water. *Hyatt v. Albro*, 121 Mich. 638 (80 N. W. Rep. 641). Citing, *West v. Taylor*, 16 Or. 165 (13 Pac. Rep. 665); *Schaefer v. Martholer*, 34 Minn. 487 (26 N. W. Rep. 726; 57 Am. Rep. 73); *Macomber v. Godfrey*, 108 Mass. 219 (11 Am. Rep. 349); *Gould, Waters*, § 264; *Stock v. Jefferson Tp.*, 114 Mich. 357 (72 N. W. Rep. 132; 38 L. R. A. 355).

**Sec. 802. Common-law rule and civil-law rule stated and discussed—Application of latter rule to city lots.** In the case of *Carland v. Aurin*, 103 Tenn. 555 (53 S. W. Rep. 940; 48 L. R. A. 862; 76 Am. St. Rep. 699), the supreme court of Tennessee say: "Two distinct rules have been administered in the various states of the Union with respect to the right of a lower proprietor to obstruct and repel surface water flowing from the land of a higher proprietor; one being called the 'common-law rule,' and the other the 'civil-law rule.' Under what is known as the 'common-law rule,' the holding is that the right of the lower proprietor to occupy and improve his land, in such manner and for such purposes as he may see fit, either by changing the surface or by the erection of buildings or other structures thereon, is not restricted or modified by the fact that such improvements or occupation will obstruct

and repel surface water that would otherwise naturally flow thereon from adjacent and higher land, even though the land of the upper proprietor may be injured thereby. This rule is based largely upon the maxim, '*Cujus est solum, ejus est usque ad coelum et ad inferos*,' and seems to be administered in the states of Connecticut, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New York, and perhaps in Texas (except as to railroads), Vermont, and Wisconsin. On the contrary, by the rule of the civil law, the proprietor of the lower land may not obstruct, by any means, the natural flow of surface water, and turn it back, to the injury of the higher lands of his neighbor; the latter owner having by the law of nature, an easement or servitude of drainage over the lands of the former for the flow of surface waters. This rule is based partly upon the necessity of the situation, and partly upon the maxim, '*Sic utere tuo ut alienum non laedas*,' and appears to prevail in Arkansas, Alabama, California, Georgia, Illinois, Iowa, Kentucky, Louisiana, Maryland, Michigan, Nevada, North Carolina, Ohio, Pennsylvania, Tennessee, Texas (as to railroads), Virginia, and West Virginia. There seemingly have been some changes from one rule to the other in Arkansas, Missouri, Iowa, New Hampshire, and some of the other states; and South Carolina appears to occupy a kind of middle ground between the two, allowing the lower owner to make any reasonable use of his land which may not unreasonably injure adjacent property above. The two rules are considered, and most of the adjudged cases cited, in 24 Am. & Eng. Enc. Law, pp. 907-922, inclusive; in *Gray v. McWilliecs*, 98 Cal. 157 (32 Pac. Rep. 976; 21 L. R. A. 593 and note; 35 Am. St. Rep. 163); in *Sheehan v. Flynn*, 59 Minn. 436 (61 N. W. Rep. 462; 26 L. R. A. 632, and note); in *Vanderwiele v. Taylor*, 65 N. Y. 341, 345; in *Barkley v. Wilcox*, 86 N. Y. 141 (40 Am. Rep. 519); in *City of Waverly v. Page*, 105 Ia. 225 (74 N. W. Rep. 938; 40 L. R. A. 465, and note); and in *Cooley, Torts*, pp. 574-580, inclusive. Judge Dillon, adopting the remark of Lord Tenderden—*Rex v. Commissioners*, 8 Barn. & C. 355, 360—in reference to the rights of owners along the seacoast, says that the law largely regards surface waters a common enemy, which every pro-

prietor may fight or get rid of as best he may. 2 Dil. Mun. Corp. (4th Ed.) § 1039. The cases decided by this court are *Carriger v. Railroad Co.*, 7 Lea, 388; *Railroad Co. v. Hays*, 11 Lea, 382 (47 Am. Rep. 291); and *Railway Co. v. Mossman*, 90 Tenn. 157 (16 S. W. Rep. 64; 59 Am. St. Rep. 787). All of these cases give distinct recognition and application to what is called the 'civil-law rule,' without so naming it, or mentioning the other rules. In the first of them, the following language was quoted and adopted from *Add. Torts*, (Wood's Ed.) p. 95, viz.: 'Land cannot be cultivated or enjoyed unless the springs which rise on the surface and the rains that fall thereon be allowed to make their escape through the adjoining and neighboring lands. All lands, therefore, are, of necessity, burdened with the servitude of receiving and discharging all waters which flow down to them from lands on a higher level; and if the owner or occupier of the lower lands interposes artificial impediments in the way of the natural flow of the water through or across his lands, and by so doing causes the higher lands to be flooded, he is responsible in damages for infringing the natural right of the possessor of such higher land to the natural outflow and drainage of the soil, unless he has gained a right to pen back water by contract, grant, or prescription. So that if the proprietor of the higher lands alters the natural condition of his property, and collects the surface and rain water together at the bottom of his estate, and pours it in a concentrated form and in unnatural quantities upon the land below, he will be responsible for all damages thereof caused to the possessor of the lower lands.' Judge Cooley, after noting the fact that some of the states apply the one rule and some the other, says that 'no doubt all the states would recognize an exception [to the civil-law rule] in favor of the owner of a town lot, who must be at liberty to cut off drainage across it, or his lot would be worthless for many purposes. In respect to agricultural lands, strong reasons may be given for either view, and it is probable that each will continue to find supporters thereafter as heretofore.' Cooley, *Torts*, p. 577. Elsewhere it is said: 'In some states a distinction has been made between urban and rural property, and it has been held, or, at all events, an opinion has been expressed, that the rule of the civil law that the

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lower proprietor holds his land subject to the burden of receiving the surface water which naturally drains from the higher lands does not apply to city and village lots.' 24 Am. & Eng. Enc. Law, 915. In support of the last statement, the author cites cases from Alabama, Iowa, Michigan, and Pennsylvania, four of the states in which the civil-law rule prevails as to rural lands, and two cases from New York, one of the states in which the common-law rule prevails. In a later case from Iowa, however—*City of Waverly v. Page*, 105 Ia. 225 (74 N. W. Rep. 938; 40 L. R. A. 465)—the civil-law rule was applied in favor of the owner of a city lot, and that, too, as against the municipality itself; and the same rule seems to have been applied as to urban property in Georgia, *Goldsmith v. Elsas*, 53 Ga. 186; in Illinois, *Gormley v. Sanford*, 52 Ill. 159; in Kentucky, *Kemper v. City of Louisville*, 14 Bush, 87; in Louisiana, *Bowman v. City of New Orleans*, 27 La. Ann. 501; in Virginia, *Smith v. City Council of Alexandria*, 33 Grat. 208 (36 Am. Rep. 788); and in other states. We are unable to see any difference in principle between the reciprocal rights and duties of adjacent urban proprietors and those of adjacent rural proprietors, and hence we do not think it wise to apply one rule to city lots and a different rule to agricultural lands, especially in the same state. Having heretofore, in the three cases mentioned, determined the rights of adjacent rural proprietors by the civil-law rule, and still deeming that the better doctrine, we now apply it to urban lots, and in doing so overrule the first ground of demurrer."

**Sec. 803. Rights of upper and lower owners.** In South Carolina the common law rule giving a land owner right to repel surface water by the erection of obstructions is recognized, and he is not liable to an adjoining proprietor for damages on account of such obstructions unless a nuisance per se is created by the accumulation of water upon the latter's lands; the mere creation for a considerable time after each rain of a pool of stagnant water which emits nauseous odors and poisonous gases is not of itself a nuisance. *Baltzeger v. Carolina Midland Ry. Co.*, 54 S. C. 242 (32 S. E. Rep. 358; 71 Am. St. Rep. 789). The liability of a land owner for diverting surface water to the

injury of another depends upon the necessity and reasonableness of his act. *Oftelie v. Town of Hammond*, 78 Minn. 275 (80 N. W. Rep. 1123). In the exercise of his right to fight surface water a landowner must not cause unnecessary damage to his neighbor's land. *Baker v. Allen*, 66 Ark. 271 (50 S. W. Rep. 511; 74 Am. St. Rep. 93). In California it is held that a landowner cannot protect his own land to the injury of the land of another by turning the storm or surface water which naturally would flow thereon away from his own and onto the lands of another. *Cushing v. Pires*, 124 Cal. 663 (57 Pac. Rep. 572). One who maintains a ditch which diverts surface waters away from their natural flow and onto the land of another, to the injury of such land, is chargeable with maintaining a nuisance. *Town of Cloverdale v. Smith*, 128 Cal. 230 (60 Pac. Rep. 851). The overflow of lakes which really are enlargements of a river will not be treated as surface water so as to give the riparian owners the right to deepen the channel of the river for the purpose of reclaiming lands covered by the overflow, to the injury of the owner of a lower dam. *Hyatt v. Albro*, 121 Mich. 638 (80 N. W. Rep. 641). Damages for the obstruction of the flow of surface water can be recovered up to the time only when the obstruction easily can be removed. *Baker v. Allen*, 66 Ark. 271 (50 S. W. Rep. 511; 74 Am. St. Rep. 93).

**Sec. 804. Collection and discharge of water from roof of building.** One, who, by the arrangement of the roof and gutter on his building, so collects and discharges water on his neighbor's land as to cause a wall thereon to fall, is liable, whether the wall was well constructed or not. *Fitzpatrick v. Welch*, 174 Mass. 486 (55 N. E. Rep. 178; 48 L. R. A. 278). The court say: "One who arranges a roof and gutter in such a way that the first will collect water, and the second manifestly will discharge it upon a neighbor's land unless prevented, has notice that he threatens harm to his neighbor of a kind which the law, in its adjustment of their conflicting interests, does not permit him knowingly to inflict. *Bates v. Inhabitants of Westborough*, 151 Mass. 174, 181 (23 N. E. Rep. 1070; 7 L. R. A. 156). The danger is so manifest, so constant, and so great that although, no doubt, a possibility of harm does

not always require more than the exercise of ordinary care to prevent it—*Quinn v. Crimmings*, 171 Mass. 255 (50 N. E. Rep. 624; 42 L. R. A. 101; 68 Am. St. Rep. 420),—and although in some states only ordinary care is required in cases like this—*Underwood v. Waldron*, 33 Mich. 232, 238, 239; *Garland v. Towne*, 55 N. H. 55 (20 Am. Rep. 164),—the requirement here and elsewhere is higher, and sometimes is stated as absolute, to prevent at one's peril the harm from coming to pass—*Shipley v. Fifty Associates*, 106 Mass. 194, 199 (8 Am. Rep. 318); *Jutte v. Hughes*, 67 N. Y. 267, 272. If the defendant is liable, she is liable for damage to artificial structures upon the plaintiff's land—*Cooper v. Dolvin*, 68 Ia. 757 (28 N. W. Rep. 59; 56 Am. Rep. 872); *Martin v. Simpson*, 6 Allen, 102, 105;—and, if the discharge of water caused the wall to fall, she is liable for it, whether the wall was well constructed or not."

**Sec. 805. Right of landowner to construct ditches and drains.** Injunction will lie against a land owner draining his land by artificial drains and discharging the water so collected upon or in close proximity to his neighbor's land, to the latter's injury. *Nicolai v. Wilkins*, 104 Wis. 580 (80 N. W. Rep. 939). Though a tract of land be subject to the legal servitude of receiving the waters running naturally from another adjoining it, the proprietor of the latter is not entitled to enter at pleasure on the contiguous property, without the consent of the owner, and dig thereon a ditch to increase the drain. *Sharpe v. Levert*, 51 La. Ann. 1249 (26 So. Rep. 100). An upper owner having constructed ditches which facilitate and increase the flow of surface water from his land onto the land of a lower owner, who afterward asks a court of equity to remove obstructions to his ditches made by the lower owner, will be required to close the ditches and restore the land to its natural condition. *Grinstead v. Sanders*, Ky. (56 S. W. Rep. 665). For a particular fact case discussing the right of a land owner to drain surface water into a stream, see, *Mizell v. McGowan*, 125 N. C. 439 (34 S. E. Rep. 538).

**Sec. 806. Diversion of surface water by a railroad.** A railroad company is not liable to an adjoining owner

for injuries resulting from its changing the ordinary course of the flow of surface water by the lowering of the grade of its road bed for the better prosecution of its own business. *Clauson v. Chicago & N. W. Ry. Co.*, 106 Wis. 308 (82 N. W. Rep. 146). A street railway company which undertakes to change the accustomed flow of surface water and to concentrate it in an underground drain and a vault, at a point where but a part of it formerly harmlessly had flowed on the surface, at its peril, is bound to provide adequate means to discharge the water so gathered by it, and to discharge it in a way that will not be injurious to others; and it cannot escape damages from its negligence in this particular by the fact that it relied upon the judgment of a competent engineer in constructing the vaults and drains; nor is the owner of the injured property required to notify the company before instituting suit for damages. *Lion v. Baltimore City Pass. Ry. Co.*, 90 Md. 266 (44 Atl. Rep. 1045; 47 L. R. A. 127). For particular fact cases in reference to the diversion of surface waters by railroads, see *Fossum v. Chicago, M. St. P. Ry. Co.*, 80 Minn. 9 (82 N. W. Rep. 979); *Harrelson v. Kansas City & A. R. Co.*, 151 Mo. 482 (52 S. W. Rep. 368); *Ecton v. Lexington & E. Ry. Co.*, Ky. (53 S. W. Rep. 523; 21 Ky. Law Rep. 921).

**Sec. 807. Liability of municipalities.** A city is not bound to provide public sewers nor is it liable for nuisances arising from its failure to do so, Mayor, etc. of City of Chattanooga *v. Reid*, 103 Tenn. 616 (53 S. W. Rep. 937); but a city is liable for damages resulting from its failure to keep its sewers open. See opinion as to proper measure of damages. *City of Louisville v. O'Malley*, Ky. (53 S. W. Rep. 287; 21 Ky. Law Rep. 873). A municipality is liable for injuries resulting to property by flooding, occasioned by its agents carelessly failing to remove an obstruction placed in a sewer by them for temporary purposes. *Judd v. City of Hartford*, 72 Conn. 350 (44 Atl. Rep. 510; 77 Am. St. Rep. 312). A municipal corporation, in the exercise of its corporate powers to construct and maintain public works, has no power to collect water by artificial means, and discharge it, or permit it to discharge or overflow, upon the premises of an adjacent freeholder,

so as to interfere with his possession; and acts of this character constitute such an invasion of private property as to constitute an appropriation of it to public use, and the principle exempting municipal corporations from liability arising from damages occasioned by the exercise of their discretionary powers in the construction and maintenance of public works does not apply, and the corporation is liable for damages resulting therefrom. *Town of Norman v. Ince*, 8 Okla. 412 (58 Pac. Rep. 632). A municipal corporation is not liable for damages caused by such increased flow in a natural water course as results from the improvement of lots and streets within the territory whose waters naturally drain into such water course. *Springfield v. Spence*, 39 O. St. 665, followed and approved. *City of Hamilton v. Ashbrook*, 62 O. St. 511 (57 N. E. Rep. 239). In California it is held that a city is not liable for damages caused by an obstruction of the flow of surface waters from the lands of an abutting owner, occasioned by the necessary and lawful grading of the street in front thereof. *Lampe v. City and County of San Francisco*, 124 Cal. 546 (57 Pac. Rep. 461). In Georgia it is held that a county which causes public roads to be worked or drained in such a manner as to injure or damage the adjacent premises is liable therefor. *Barfield v. Macon County*, 109 Ga. 386 (34 S. E. Rep. 596). In Massachusetts it is held that if a town, in the performance of its duty to keep a highway safe and convenient for travel, diverts the surface water upon the neighboring land, it is not answerable in tort; and this is the rule even where the water is gathered into artificial channels before passing from the highway, or where it is drained into a water course. *Holleran v. City of Boston*, 176 Mass. 75 (57 N. E. Rep. 220). In West Virginia a municipal corporation is not liable for damage to a lot by reason of change of a street's grade operating upon surface water, though it may increase it; but if the work operates, as its direct effect, to collect and cast water in a mass on the lot, the corporation is liable. *McCray v. Town of Fairmont*, 46 W. Va. 442 (33 S. E. Rep. 245).

# TAXES AND TAX TITLES

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## EPITOME OF CASES.

**Sec. 808. Taxation not the taking of private property for public use.** Va. Code, §§ 661, 666, which provide for the sale of lands purchased by the state for delinquent taxes after two years has been given to the owner in which to redeem, and for the issuance of a deed to the purchaser which can be defeated only by proof that the taxes were not properly chargeable on the real estate or that they had been paid, is not a taking of the property of a citizen without due process of law. *Virginia Coal Co. v. Thomas*, 97 Va. 527 (34 S. E. Rep. 486). A constitutional provision (Utah Const., art. 1, § 22) providing that "private property shall not be taken or damaged for public use without just compensation," is not a limitation on the taxing power of the state, but is a limitation on the power of eminent domain. *Kimball v. City of Grantsville City*, 19 Utah, 368 (57 Pac. Rep. 1; 45 L. R. A. 628). The court concludes an exhaustive discussion of the distinction between the power of eminent domain and the power of taxation by saying: "In 1 *Desty, Tax'n*, p. 30, the author says: 'Private property may be taken for public use either by the power of taxation or the power of eminent domain; but, while the right to take private property for public use under the power of eminent domain is conditioned upon just compensation, the taxing power is not thus limited.' So, in *Potter's Dwar*, St. 404, it is said: 'The restriction on taking private property without compensation does not apply to the power of taxation.' In *Cooley Const. Lim.* 613, it is observed: 'When the constitution provides that private property shall not be taken for public use without just compensation made therefor, it has reference to an appropriation thereof under the right of eminent domain.' In *Mobile Co. v. Kimball*, 102 U. S. 691, Mr. Justice Field, delivering the opinion of the court, said: 'The expenses of the work were, of course, to be ultimately defrayed by

taxation upon the property and people of the county. But neither is taxation for a public purpose, however great, the taking of private property for public uses, in the sense of the constitution. Taxation only exacts a contribution from individuals of the state or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But, when private property is taken for public use, the owner receives full compensation.' So, in *Gilman v. City of Sheboygan*, 2 Black, 510, Mr. Justice Swayne, delivering the opinion, said: 'The objection that these acts take private property for public purposes without compensation, and hence are within the prohibition of the state constitution upon that subject, is also without foundation. That clause of the constitution refers solely to the exercise by the state of right of eminent domain.' In the leading case of *People v. City of Brooklyn*, 4 N. Y. 419 (55 Am. Dec. 266), Mr. Justice Ruggles expressed the opinion that money could not be exacted by the government by right of eminent domain, excepting, perhaps, for the direct use of the state at large, and where the state at large was to make the compensation, and then observed: 'The exigencies of a state government can seldom require the taking of money by virtue of this power, even in time of war, and never in time of peace. The framers of the constitution could not have intended to delegate to municipal corporations the right of taking money under this power, because it is entirely unnecessary. Money can always be had by taxation; lands cannot; and therefore lands may be taken by right of eminent domain, but money may not.' And in *Stewart v. Board*, 30 Ia. 9, Mr. Justice Miller, speaking for the court, said: 'While the right to take private property for public use is conditioned upon making compensation, the taxing power is not thus limited. Indeed, the very idea of taxation implies the power to collect levies of money from the people without making any direct pecuniary compensation. The only revenue possessed by the state is derived from taxation, and it would be absurd to say that she should compensate the citizens for taxes collected. It is well settled that this clause of the constitution requir-

ing compensation to be made where private property is taken for public use is not a limitation upon the taxing power.' Dill. Mun. Corp. § 738; *Cooley, Tax'n*, 237; *People v. Lawrence*, 41 N. Y. 137; *Sharpless v. Mayor, etc.*, 21 Pa. St. 147 (59 Am. Dec. 759); *Nichols v. City of Bridgeport*, 23 Conn. 189 (60 Am. Dec. 636); *Town of Guilford v. Cornell*, 18 Barb. 615; *McMasters v. Com.*, 3 Watts. 292; *Williams v. City of Detroit*, 2 Mich. 560; *Moale v. City of Baltimore*, 5 Md. 314 (61 Am. Dec. 276); *Schenley v. City of Allegheny*, 25 Pa. St. 128; *Com. v. Alger*, 7 Cush. 53; *Justices of Clarke Co. Court v. Paris, W. & K. R. Turnpike Co.*, 11 B. Mon. 143; *in re Extension of Hancock St.*, 18 Pa. St. 26; *Booth v. Town of Woodbury*, 32 Conn. 118; *Norris v. City of Waco*, 57 Tex. 635; *City of Aurora v. West*, 9 Ind. 74."

**Sec. 809. Forfeiture of land for nonentry for taxation.** Section 6 of article 13 of the constitution of West Virginia, forfeiting land for the failure of the owner to enter it for taxation, is not in violation of that clause of the fourteenth amendment to the federal constitution restraining states from depriving any person of life, liberty, or property without due process of law. *State v. Sponaugle*, 45 W. Va. 415 (32 S. E. Rep. 283; 43 L. R. A. 727); *State v. Swann*, 46 W. Va. 128 (33 S. E. Rep. 89). See first case cited for exhaustive discussion of what constitutes due process of law. Where a grantor conveys the gas and oil in a tract of land, and the assessor fails to charge the interest so conveyed on the land book in the name of the grantee, for taxation, with its equitable proportion of the valuation of the land of which it is a part, as provided by W. Va. Code, ch. 29, § 25, and the land remains charged as a whole to the grantor at the full valuation, and he keeps the taxes paid thereon, there can be no forfeiture of such oil and gas interest for nonentry for five years in the name of the grantee. *State v. Low*, 46 W. Va. 451 (33 S. E. Rep. 271). Where the life tenant and the remainderman are in possession of real estate which is assessed in the name of the remainderman, and the taxes are paid by him, the estate of said life tenant will not be forfeited to the state by reason of his failure to have said life estate assessed



on the land books, or to pay the taxes thereon. *McDougal v. Musgrave*, 46 W. Va. 509 (33 S. E. Rep. 281).

**Sec. 810. Collateral inheritance tax—Statutes construed.** Cal. Laws 1893, p. 193, as amended by Laws 1897, p. 77, concerning collateral inheritance tax, held unconstitutional. *In re Stanford's Estate*, 126 Cal. 112 (58 Pac. Rep. 462). Ia. Laws 26th Gen. Assem., ch. 28, providing for a collateral inheritance tax upon certain devisees of property is held unconstitutional, on account of its depriving the devisees of the property without due process of law, in that it authorizes the fixing of the appraisement for such taxation without notice or opportunity for them to be heard. See opinion as to effect of the amendment of this statute so as to cure this defect, by Laws 27th Gen. Assem., ch. 37. *Ferry v. Campbell*, 110 Ia. 290 (81 N. W. Rep. 604; 50 L. R. A. 92). Ia. Code, § 1467 construed and applied—collateral inheritance tax. *Weaver's Estate v. State*, 110 Ia. 328 (81 N. W. Rep. 603); *Herriott v. Bacon*, 110 Ia. 342 (81 N. W. Rep. 701). Minn. Laws 1897, ch. 293, providing for a collateral inheritance tax, is held unconstitutional. *Drew v. Tift*, 79 Minn. 175 (81 N. W. Rep. 839; 47 L. R. A. 525; 79 Am. St. Rep. 446). N. Y. Laws 1892, ch. 399, § 1, subd. 3 construed and applied—tax upon the transfer of property made in contemplation of death, "or intended to take effect in possession or enjoyment at or after such death." *In re Bostwick's Estate*, 160 N. Y. 489 (55 N. E. Rep. 208). Pa. Laws 1887, p. 79, § 3 construed and applied—collateral inheritance tax—remainders. *In re Cox's Estate*, 193 Pa. St. 100 (44 Atl. Rep. 256). Tenn. Laws 1893, chs. 89, 174; Laws 1895, p. 579, construed and applied—collateral inheritance tax—repeal of statutes. *Zickler v. Union Bank & Trust Co.*, 103 Tenn. 277 (57 S. W. Rep. 341).

**Sec. 811. Exemption from taxes—General principles—Statutes construed.** Statutes exempting property from taxation are to be construed strictly. *City of Middlesboro v. New South Brewing & Ice Co.*, Ky. (56 S. W. Rep. 427; 21 Ky. Law Rep. 1782); *German Bank v. City of Louisville*, Ky. (56 S. W. Rep. 504). A general exemption from taxes does not include special assess-

ments for municipal improvements. *Scott v. Society of Russian Israelites*, 59 Neb. 571 (81 N. W. Rep. 624); *Trustees of Phillips Academy v. Inhabitants of Andover*, 175 Mass. 118 (55 N. E. Rep. 841; 48 L. R. A. 550). Where a provision in a city charter exempting property from municipal taxation conflicts with a constitutional provision subsequently adopted, the exemption thereby is abrogated. *McLendon v. City of Lagrange*, 107 Ga. 356 (33 S. E. Rep. 405). The liability of property for the taxes of a current year becomes fixed on the day the lien for such taxes attached to the property, and such lien is not divested by a subsequent sale to a corporation whose property is exempt from general taxation. *State v. Northwestern Tel. Exch. Co.*, 80 Minn. 17 (82 N. W. Rep. 1090). Property within a city is subject to a city tax without regard to the benefits received by it. *Hughes v. Carl*, Ky. (50 S. W. Rep. 852; 21 Ky. Law Rep. 6). In order for property to be exempt from taxation it clearly must be shown to come within the exemption provided for by statute. Ill. Rev. Stat., ch. 120, § 2 construed and applied. *In re McCullough*, 183 Ill. 373 (55 N. E. Rep. 685). Ia. Laws 23d Gen. Assem., ch. 1, § 3 construed and applied—exemption of agricultural lands in the city of Des Moines. *Windsor v. Polk Co.*, 109 Ia. 156 (80 N. W. Rep. 323). La. Const., 1879, art. 207 construed and applied—exemption of property of educational and charitable institutions. *State v. Board of Assessors*, 52 La. Ann. 223 (26 So. Rep. 872). Construing and applying Mass. Pub. Stat., ch. 11, § 5, cl. 3, as amended by Stat. 1889, ch. 465, exempting from taxation the property of literary, benevolent, charitable and scientific institutions, "occupied by them or their officers for the purposes for which they were incorporated," it is held that in order to exempt property under the statute its occupancy must have or must be supposed to have a direct connection with such purposes; and that premises occupied by professors of an academy and their families may be claimed as exempt under the statute. *Trustees of Phillips Academy v. Inhabitants of Andover*, 175 Mass. 118 (55 N. E. Rep. 841; 48 L. R. A. 550). This case is approved and followed in the case of *President of Harvard College v. Assessors*, 175 Mass. 145 (55 N. E. Rep. 844; 48 L. R. A. 547), where a similar con-

struction is given the statute. Neb. Laws 1899, ch. 47, in so far as it attempts to exempt the property of insurance companies from taxation or to release or commute the taxes of such companies, is unconstitutional. *State v. Poynter*, 59 Neb. 417 (81 N. W. Rep. 431). As to the exemption from taxation of the property of natural gas companies incorporated under Pa. Laws 1885, p. 29, see *St. Marys Gas Co. v. Elk Co.*, 191 Pa. St. 458 (43 Atl. Rep. 321); *Ridgway Light & Heat Co. v. Elk Co.*, 191 Pa. St. 465 (43 Atl. Rep. 323). Wis. Rev. Stat., § 1038, subds. 4, 17, exempting from taxation "lands owned and used" by any county agricultural society exclusively for fair grounds and all property "used exclusively" for industrial and agricultural exhibitions, does not exempt land which is not owned by such an association but which is held by it under a lease for years, although used exclusively for fair grounds. *Douglas Co. Agricul. Soc. v. Douglas Co.*, 104 Wis. 429 (80 N. W. Rep. 740).

**Sec. 812. Exemption from taxes—Public lands and public property—Property of municipality outside of its limits.** A preemptor of public land whose entry has been reinstated after a cancellation thereof upon the erroneous belief that the government's title had previously passed by a railroad grant is the equitable owner of the land, so as to make the same subject to taxation although a patent has not yet been issued to him. *Davis v. Magoun*, 109 Ia. 308 (80 N. W. Rep. 423). Property dedicated to a public use is exempt from taxation. *Mayor of Alexandria v. O'Shee*, 51 La. Ann. 719 (25 So. Rep. 382). Ky. Const., § 170, exempting from taxation "public property used for public purposes," exempts public parks maintained at public expense, and buildings and appliances necessary to meet the demands of the fire department of a city, *Guffy and White, JJ., dissenting, City of Owensboro v. Commonwealth*, Ky. (49 S. W. Rep. 320; 44 L. R. A. 202; 20 Ky. Law Rep. 1281); and property of a city used by it in supplying water and gas to its citizens. *Negley v. City of Henderson*, Ky. (55 S. W. Rep. 554; 21 Ky. Law Rep. 1394), following *City of Covington v. Commonwealth*, Ky. (39 S. W. Rep. 836; 19 Ky. Law Rep. 105). Under 3 N. J. Gen. Stat., p. 3320, pl. 200, property

of municipalities is exempt from taxation although pecuniary profit is derived from its use. *State v. Conover*, 63 N. J. L. 191 (42 Atl. Rep. 838). N. H. Pub. Stat., ch. 55, § 2, exempting from taxation "real estate of the \* \* \* town used for public purposes," does not include property of the town used for a public purpose, but lying outside its limits and within another town. *Town of Newport v. Town of Unity*, 68 N. H. 587 (44 Atl. Rep. 704; 73 Am. St. Rep. 626).

**Sec. 813. Exemption from taxes—Property of educational institutions.** Houses occupied as residences by the president and professors of a college, and dormitories furnished by it without rent or lease for the benefit of its students to enable them to procure board at cost, are exempt from taxation, under Mass. Pub. Stat., ch. 11, § 5, cl. 3, as amended by Stat. 1889, ch. 465, exempting the property of scientific institutions "occupied by them or their officers for the purposes for which they were incorporated." *Trustees of Phillips Academy v. Inhabitants of Andover*, 175 Mass. 118 (55 N. E. Rep. 841; 48 L. R. A. 550); *President of Harvard College v. Assessors*, 175 Mass. 145 (55 N. E. Rep. 844; 48 L. R. A. 547). The exemption from taxation of "buildings occupied as colleges" given by Conn. Gen. Stat. § 3820, extends to universities and includes buildings used as dormitories and dining halls for students, although certain sums are paid by the students for the use of the rooms occupied therein. *Yale University v. Town of New Haven*, 71 Conn. 316 (42 Atl. Rep. 87; 43 L. R. A. 490). Ill. Rev. Stat., ch. 120, § 2, exempting from taxation the property of institutions of learning, including the real estate on which the institutions are located, does not exempt real property adjoining a Catholic school used as a play ground and forming a constituent part of the school, where the legal title is not in the school or held in trust for it, but is held by a Catholic bishop in trust for the use of a congregation of a parish in the same vicinity. *In re McCullough*, 183 Ill. 373 (55 N. E. Rep. 685); *In re McCullough*, 186 Ill. 15 (57 N. E. Rep. 837; 50 L. R. A. 517).

**Sec. 814. Exemption from taxes—Property of churches and charitable institutions.** Mass. Pub. Stat.,

ch. 11, § 5, exempting real estate of charitable institutions does not apply to land occupied by such an institution and owned by a third person. *Bates v. Inhabitants of Sharon*, 175 Mass. 293 (56 N. E. Rep. 586). Under Neb. Comp. Stat., ch. 77, art. 1, § 2, property used directly, immediately and exclusively for religious purposes is exempt from taxation, without regard to the question of absolute ownership. *Scott v. Society of Russian Israelites*, 59 Neb. 571 (81 N. W. Rep. 624). 3 N. J. Gen. Stat., pp. 3320, 3321, which exempt from taxation "all buildings used exclusively for charitable purposes, with the land whereon the same are erected, and which may be necessary for the fair enjoyment thereof," applies to an association established and sustained by voluntary contributions from the charitable, whose object is to afford food, lodging and clothing to the needy, requiring work in aid of the charity from those who are able to work; nor is such an institution deprived of its right to exemption by the fact that it pays a salary to its superintendent and his assistant, nor by a covenant in a mortgage given by it not to apply for any deduction from taxation because of such mortgage. *Paterson Rescue Mission v. High*, 64 N. J. L. 116 (44 Atl. Rep. 974). 3 N. J. Gen. Stat., p. 3320, § 200 construed and applied—exemption of property used for charitable purposes. *State v. Burdsall*, 63 N. J. L. 85 (42 Atl. Rep. 853). Construing and applying Pa. Const., art. 9, § 1, providing for the exemption from taxation of all "institutions of purely public charity," and Laws 1874, p. 158, exempting from taxation "all hospitals, universities, colleges, seminaries, academies, associations and institutions of learning, benevolence or charity, with the grounds thereto annexed, and necessary for the occupancy and enjoyment of the same, founded, endowed and maintained by public or private charity," it is held that a convent used as a residence for teachers in a school free to all classes and creeds, erected and maintained by the Catholic church, is exempt from taxation; and such exemption is not affected by the fact that such occupancy forms a part of the compensation for such teachers, nor by the fact that the title to the school property is in an individual who may terminate its use for that purpose. *White v. Smith*, 189 Pa. St. 222 (42 Atl. Rep. 125; 43 L. R. A. 498). Construing and applying Wis.

Rev. Stat., § 1038, subd. 3 exempting from taxation the real estate "necessary for the location and convenience of the buildings" of a religious association, it is held that the exemption does not extend to a parsonage used in connection with a Roman Catholic church, the title to which is held absolutely in fee by the bishop of such church. *Katzer v. City of Milwaukee*, 104 Wis. 16 (79 N. W. Rep. 745; 80 N. W. Rep. 41).

**Sec. 815. Exemption from taxes—Property of Masonic lodge.** Property of a Masonic lodge which provides for its members and their families or the widows and orphans of those who are dead, is not exempt from taxation, under Ky. Const., § 170, exempting institutions of "purely public charity." *City of Newport v. Masonic Temple Ass'n*, Ky. (56 S. W. Rep. 405; 49 L. R. A. 252; 21 Ky. Law Rep. 1785). The court say: "A Masonic lodge, which provides for its members and their families, or the widows and orphans of those who are dead, is a commendable private charity; but it is in no sense purely public. This question has often been presented to the courts, and, so far as we have seen, under provisions like ours the decisions are uniform. The constitution of Ohio is the same as ours. In *Lodge v. Hayslip*, 23 O. St. 144, the facts were substantially the same as here. The court said: 'A charitable or benevolent association, which extends relief only to its own sick and needy members, and to the widows and orphans of its deceased members, is not "an institution of purely public charity," and its moneys held and invested for the aforesaid purposes are not exempt from taxation. The constitution of Pennsylvania is also the same as ours. In *Philadelphia v. Masonic Home of Pennsylvania*, 160 Pa. St. 572 (28 Atl. Rep. 954; 23 L. R. A. 545; 40 Am. St. Rep. 736), the question was whether the property of the Masonic Home, open only to those who were Masons, was exempt. The court said: 'When the eligibility of those admitted is thus determined, it seems to us that the institution is withdrawn from public, and put in the class of private, charities. A charity may restrict its admissions to a class of humanity, and still be public. It may be for the blind; the mute, those suffering under special diseases; for the aged; for infants; for wo-

men; for men, for different callings or trades by which humanity earns its bread; and, as long as the classification is determined by some distinction which involuntarily affects or may effect any of the whole people, although only a small number may be directly benefited, it is public. But when the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which concerns not the public at large. The public is interested in the relief of its members, because they are men, women, and children, and not because they are Masons. A home without charge, exclusively for Presbyterians, Episcopalians, Catholics, or Methodists, would not be a public charity. But then, to exclude every other idea of public as distinguished from private, the word "purely" is prefixed by the constitution. This is to intensify the word "public," not "charity." It must be purely public; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. \* \* \* If this [charity] be purely public, then what is not purely public? This is not a question to be decided on sentiment. If it were, our inclinations would prompt to a different conclusion. But there is not much sentiment in the constitution. It is a barrier erected by the whole people against encroachments on the rights of the people as a whole.' In the previous case of *Delaware County Inst. of Science v. Delaware County*, 94 Pa. St. 163, an institute of science for 'the promotion and diffusion of general and scientific knowledge among the community at large, and the establishment and maintenance of a library and museum,' the benefits of which were restricted to members except upon conditions prescribed by a board of managers, was held not exempt from taxation. The court said: 'The plaintiff in error, so far from being a purely public charity, is not a public charity at all. It is a private corporation, for the benefit of its members, as much so as any other beneficial or literary society.' In *Bangor v. Lodge*, 73 Me. 428 (40 Am. Rep. 369), a Masonic lodge was held subject to taxation under a statute much broader in its exemption than our constitution. Among other things, the court said: 'The just and honest rule in assessments for governmental purposes is equality of taxation. Whatever sacrifices it requires from

the people should be made to bear as nearly as possible with the same pressure upon all. In this way only will there be the least sacrifice by all. If one bears less than his share of the public burden, some other must bear more. If one block of stores remains untaxed, the remaining stores and other taxable property must be unduly and disproportionately taxed. The more numerous the exemptions, the more unequal and burdensome the taxation.' Then, after showing that an exemption must be construed with the utmost strictness, and that the party claiming it must bring his case unmistakably within the spirit and intent of the exception, the court said: 'It is apparent that the defendant corporation cannot be regarded as a purely public charitable institution, because it wants the essential elements of a public charity. It has other objects than charity. Whatever its ultimate purposes, they are other than charitable. Its funds are derived, not from devises and gifts as in the case of a public charity, but from fees and the assessment of its members. The funds so obtained are to be distributed among the poor and needy members from whom they were collected, and among their wives and children. It is an association for the mutual benefit of its members, and not a charitable institution, within the meaning of the statute.' In *Babb v. Reed*, 5 Rawle, 151 (28 Am. Dec. 650), an Odd Fellows lodge formed for the purpose of employing certain funds for the mutual benefit of its members and their families was held not to be an association for charitable uses. See, also, *State v. McGrath*, 95 Mo. 193 (8 S. W. Rep. 425); *State v. Central St. Louis Masonic Hall Ass'n*, 14 Mo. App. 596. In *Young Men's Protestant Temperance & Benevolence Soc. v. City of Fall River*, 160 Mass. 409 (36 N. E. Rep. 57), it was held that a temperance society, which used its funds exclusively for the benefit of its members, was not exempt from taxation as a charitable institution. The same rule was followed as to a Young Men's Christian Association having a similar rule in New Jersey, in *Trustees of Young Men's Christian Ass'n v. City of Paterson*, 61 N. J. L. 420 (34 Atl. Rep. 655), and in Maine, in *City of Auburn v. Young Men's Christian Ass'n of Auburn*, 86 Me. 244 (29 Atl. Rep. 992); no question of religious uses being made in either of these cases. In South Carolina, in *Society v. Addison*, and



*Lodge v. Same*, 2 S. C. 499, the same rule was followed, and it was held that neither of the appellants was entitled to the exemption. Summing up the authorities, the learned author of 12 Am. & Eng. Enc. Law (2nd Ed.) p. 343, says: 'While there are decisions to the contrary, the preponderance of authority is in favor of the doctrine that an exemption of benevolent and charitable institutions does not extend to a society which confines its benefits to members or their families.' The contrary decisions to which he refers are all under provisions exempting simply charitable institutions. In none of them was the exemption confined to institutions of purely public charity, and in several of the cases this distinction is pointed out."

The supreme court of Missouri hold that a Masonic lodge building, the first two stories of which are rented and the third used as a lodge hall, is not exempt from taxation, under Mo. Const., art. 10, § 6, and Rev. Stat. 1889, § 7504, which exempt from taxation buildings "used exclusively for purposes purely charitable," although the rents received were used in the liquidation of a debt incurred by the lodge in constructing the building. *Fitterer v. Crawford*, 157 Mo. 51 (57 S. W. Rep. 532; 50 L. R. A. 191). This case is followed and approved in *Adelphia Lodge No. 38, K. P. v. Crawford*, 157 Mo. 356 (57 S. W. Rep. 1020). In the first case the subject is exhaustively discussed and the exemption is denied on the ground that the test of the exemption is the use of the property itself, and not the application of the income derived from it, and that in such a case the building "was not used for purely charitable purposes." The court recognizes the authorities holding that a Masonic lodge is not such an institution as constitutes a "purely public charity," within the meaning of statutes exempting only charitable institutions of this character; but it holds that a Masonic lodge is a charitable institution and can claim an exemption from taxation in that state, of property "used exclusively for purposes purely charitable." Upon this phase of the subject, the court say: "But there is a very material difference between what is denominated a public charity and what is meant by the words 'used for purposes purely charitable.' In *Delaware County Institute of Science v. Delaware County*, 94 Pa. St. 163, it is said that: 'No cor-

poration or institution is a purely public charity which is not under the control or supervision of public authorities, or at least subject to public visitation, or is founded and endowed so as to give the general public, under reasonable restrictions, an absolute right to receive its benefits; and, in the case of failure of managers to carry out the founder's will, to compel compliance therewith by an application to the court. In the case of dissolution of such a charity, its property must vest in the public authorities for charitable uses.' An institution may be used for purposes 'purely charitable' by distributing alms to the poor, needy, and the afflicted of certain sects or nationalities, or the members of certain organizations, the widows, and children. By the statute of the state of Georgia all poorhouses, almshouses, houses of industry, and any house belonging to any charitable institution, are declared to be exempt from taxation, and it was said in the case of *Mayor of City of Savannah v. Solomon's Lodge*, 53 Ga. 93, that a Masonic lodge, being a charitable institution, was exempt from taxation under the statute. *City of Indianapolis v. Grand Master of Grand Lodge of Indiana*, 25 Ind. 518, was a suit to enjoin the collection of taxes assessed upon a building commonly known as 'Masonic Hall.' The complaint alleged that the grand master, etc., was a benevolent corporation; that the building was used for purposes of universal benevolence and charity. The statute provides that 'every building erected for the use of any benevolent or charitable institution, etc., and the tract of land on which such building is situate \* \* \* shall be exempt from taxation.' It was held that the allegations made a case entitling the property to exemption under the statute, and that limiting the dispensation of its blessings to members of the lodge did not deprive it of the character of a charitable institution. In *State v. Board of Assessors*, 34 La. Ann. 574, it is held that Masonic societies are charitable institutions within the meaning of the constitution of that state, and exempt from taxation on property owned and used for their corporate purposes; but that property of such an institution, when leased or used for corporate income, will not be entitled to the exemption. So, in *City of Petersburg v. Petersburg Benevolent Mechanics' Ass'n*, 78 Va. 431, it was held, under the laws of that state, ex-

empting from taxation property owned by benevolent associations, and applied wholly to paying its current expenses, the assistance of its indigent members, and the families of such as have died in need, that these are charitable purposes, and that it is not essential that they should be universal. In *Agents v. Hinton*, 92 Tenn. 188 (21 S. W. Rep. 321), it was held that property of an incorporated publishing house, used in conducting its business, was exempt from taxation under the constitution and statutes of the state exempting property from taxation when used purely or exclusively for religious, charitable, scientific, or educational purposes, where the corporation was placed by its charter under the control of a corporation or religious society or denomination whose discipline provided that the entire net earnings arising from the business of the corporation, consisting mainly of the publication and distribution of religious literature, should be applied exclusively to the benefit of the traveling, supernumerary, superannuated, and worn-out preachers of such religious denomination, their wives, widows, and children. And in *Society v. Kelly*, 28 Or. 173 (42 Pac. Rep. 3; 30 L. R. A. 167; 52 Am. St. Rep. 769), it is held by the supreme court of Oregon that, to constitute a benevolent corporation a 'charitable' institution within the meaning of the constitution and statutes of that state exempting from taxation certain property of charitable institutions, it is not necessary that the benefits be extended to needy persons generally, without regard to the relation the recipient may bear to the society or to dues or fees paid, but it is still 'charitable' though it restricts its benefactions to its own members and their families. The agreed statement of facts shows that: the objects and purposes of said order are to nurse, care for, and provide for its sick, afflicted, and needy members and their families, bury the dead, care for the widows of its deceased members, and care for and educate their orphan children, and to inculcate in its members the principles of morality, temperance, benevolence, and charity, and teach them their duty and true fraternal relation to mankind. Its revenue is provided by membership fees paid by persons joining the order, dues by its members, and rents, as before stated. Each member of the order, not exempt, is required by its

laws to pay as regular dues three dollars per annum. The worshipful master and senior and junior wardens are the committee of the lodge on charity, and the trustees of the lodge, and as such are authorized to draw from the funds of the lodge, by an order from the worshipful master, any sum, not exceeding \$10, for the relief of any one object at one time. Except as above, the individual members of said lodge are not entitled to receive any pecuniary benefits from the lodge, and in no case are they entitled to receive, directly or indirectly, any benefit, profit, or private gain from said lodge, or in any manner participate in the distribution of the funds or property of the lodge. The lodge is wholly without profit or gain, which shows that it is purely a charity. *City of Philadelphia v. Masonic Home of Pennsylvania*, 160 Pa. St. 572 (28 Atl. Rep. 954; 23 L. R. A. 545; 40 Am. St. Rep. 736). And that it is charitable to its own members and their families is not to be questioned. *City of Bangor v. Rising Virtue Lodge*, 73 Me. 428 (40 Am. Rep. 369). Our conclusion is that Masonic lodges are organized for charitable and benevolent purposes, with no incentive to private or corporate gain, but whose revenues, derived from whatever source they may be, are applied to the payment of their current expenses, and the relief of their afflicted and needy members and their families; and, although their charity is restricted to such use, they are charitable institutions."

**Sec. 816. Exemption from taxes—Property of manufacturers and railroad property.** A statute (18 Del. Laws, ch. 175, § 31) exempting manufacturing plants from taxation, applies to such a plant though its operation is suspended temporarily on account of its owner's insolvency. *Bradford v. Mote*, 2 Marv. (Del.) 159 (42 Atl. Rep. 445). Ky. Const., § 170; Stat., § 3490, construed and applied—exemption of manufacturing establishment. *City of Middleboro v. New South Brewing & Ice Co.*, Ky. (56 S. W. Rep. 427; 21 Ky. Law Rep. 1782). Minn. Spec. Laws 1875, ch. 54 construed and applied—exemption of railroad from taxation. *St. Louis Co. v. Duluth & I. R. R. Co.*, Minn. (80 N. W. Rep. 626). Miss. Laws 1882, p. 838, § 8 construed and applied—exemption of railroads from taxation. *Yazoo & M. V. R. Co. v. Adams*, 76

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Miss. 545 (25 So. Rep. 366). 3 N. J. Gen. Stat., pp. 3324, 3332 construed and applied—exemption of railroad lands from taxation. *New Jersey Junc. R. Co. v. Mayor of Jersey City*, 63 N. J. L. 120 (43 Atl. Rep. 577); *Hoboken, R. W. & S. C. Co. v. State Board of Assessors*, 64 N. J. L. 172 (44 Atl. Rep. 960). The right of a railroad company to claim exemption of its property from taxation, under the statutes of Wisconsin, does not attach until the property is used for railway purposes. *Duluth, S. S. & A. Ry. Co. v. Douglas Co.*, 103 Wis. 75 (79 N. W. Rep. 34). The benefit of the statute exempting railroad property from taxation cannot be claimed by the purchaser of it, unless the statute expressly so provides. *Baltimore, C. & A. Ry. Co. v. Mayor of Ocean City*, 89 Md. 89 (42 Atl. Rep. 922).

**Sec. 817. Assessment of taxes—General principles—Statutes construed.** Until oil is brought to the surface it constitutes real estate, and should be assessed as such. *Carter v. Tyler County Court*, 45 W. Va. 806 (32 S. E. Rep. 216; 43 L. R. A. 725). The fact that a corporation is engaged in foreign or interstate commerce does not deprive the state in which it has its domicile of the right to tax its franchise. *Louisville & J. Ferry Co. v. Commonwealth*, Ky. (57 S. W. Rep. 624). *Sand. & H. Ark. Dig.*, §§ 2781, 6467, 6468 construed and applied—definition of railroad right of way and assessment for taxes. *St. Louis, I. M. & S. Ry. Co. v. Miller Co.*, 67 Ark. 498 (55 S. W. Rep. 926). Cal. Pol. Code, § 3650, subd. 15 construed and applied—deduction of mortgages. *Henne v. Los Angeles County*, Cal. (59 Pac. Rep. 780). A failure to authenticate a tax collector's "Tax Book" by the seal of the court, as required by 2 Wag. Mo. Stat. 1872, p. 1171, § 65, renders the tax illegal. *Burke v. Brown*, 148 Mo. 309 (49 S. W. Rep. 1023). Under Okla. Stat. 1893, § 5618, city lots must be listed and valued separately by the assessing officer; and where three lots, lying contiguous in a city, are listed separately, but all valued together, such listing and valuation do not constitute a legal assessment, and a sale of such lots under such an assessment is absolutely void. *Frazier v. Prince*, 8 Okla. 253 (58 Pac. Rep. 751). Va. Const., art. 10, § 1; Code, § 456; Code, ch. 2, § 5, subd. 10, construed and applied—assessment of real estate.

Willis' Ex'rs v. Commonwealth, 97 Va. 667 (34 S. E. Rep. 460). Va. Code, § 465 construed and applied—separate entry of each tract of land by officer making the assessment. Douglas Co. v. Commonwealth, 97 Va. 397 (34 S. E. Rep. 52).

**Sec. 818. Assessment of taxes—In whose name assessment should be made.** Property properly may be assessed in the name of the real owner although he has made a deed thereof to another, where it appears that such deed was made for the purpose of evading taxation and without any intention of parting with the title or control of the property. *H. M. Loud & Sons Lum. Co. v. Elmer Tp.*, 123 Mich. 61 (81 N. W. Rep. 965). An assessment of taxes in the name of a firm on land belonging to a member thereof, is irregular; and a purchaser at a tax sale under such assessment does not acquire title, as against a bona fide purchaser of the property at a judicial sale made between the date of the assessment and the tax sale. *Ferguson v. Clark*, Ky. (52 S. W. Rep. 964; 21 Ky. Law Rep. 697). Construing Mont. Pol. Code, §§ 3700, 3916, 4014, it is held that the listing of land in the name of a person other than the owner is but an irregularity or informality which, of itself, does not avoid the assessment or render the tax illegal or unauthorized. *Cobban v. Hinds*, 23 Mont. 338 (59 Pac. Rep. 1). The court say: "The name of the owner of the real property is, for all purposes of taxation except perhaps the imposition of a personal liability, comparatively unimportant. Support for these views is found in *Landregan v. Peppin*, 86 Cal. 122 (24 Pac. Rep. 859); *Haight v. Mayor, etc.*, 99 N. Y. 280 (1 N. E. Rep. 883); *Merrick v. Hutt*, 15 Ark. 331; *Trust Co. v. Weber*, 96 Ill. 346; *State v. Matthews*, 40 N. J. L. 268; *Bradley v. Bouchard*, 85 Mich. 18 (48 N. W. Rep. 208); *Hill v. Graham*, 72 Mich. 659 (40 N. W. Rep. 779); *Stilz v. City of Indianapolis*, 81 Ind. 582; *Schrodt v. Deputy*, 88 Ind. 90; *Strauch v. Shoemaker*, 1 Watts & S. 166." Mass. Pub. Stat., ch. 11, § 13 construed and applied—in whose name real estate should be assessed. *Bates v. Inhabitants of Sharon*, 175 Mass. 293 (56 N. E. Rep. 586); *McLoud v. Mackie*, 175 Mass. 355 (56 N. E. Rep. 714). Under Mo. Rev. Stat. 1889, §§ 7553, 7555, 7557, 7679, real

estate should be assessed in the name of the owner and not in the name of a lessee thereof. *State v. Thompson*, 149 Mo. 441 (51 S. W. Rep. 98). N. Dak. Laws 1890, ch. 132 construed and applied—in whose name property should be assessed. *Roberts v. First Nat. Bank*, 8 N. Dak. 474 (79 N. W. Rep. 1049).

**Sec. 819. Assessment of taxes—Description of property.** A description in a tax roll for D. township, as a given subdivision of section 8, T. 6, R. 6, is sufficient, although there are other townships in the state having the same number and range. *Dumphey v. Auditor General*, 123 Mich. 354 (82 N. W. Rep. 55). A tax assessment on lands: "Dist., 2; acres, 1500; value, \$100; tax, \$1.25;" and bounded by "Whaley, N. C. line, Pate, and McMahon,"—is void for defectiveness in description of the land. *Peck v. East Tennessee Lum. & Min. Co.*, Tenn. (53 S. W. Rep. 1107). For particular description held sufficient, see *In re Wenck*, 52 La. Ann. 376 (26 So. Rep. 989).

**Sec. 820. Assessment of taxes—Omission of property.** An assessment roll, from which there has been omitted a large amount of property both real and personal, and in which property in a certain locality is undervalued in order to increase the burden of taxation in another vicinity, and from which a court is not able to ascertain what would be a correct adjustment of the inequalities, will be held to be void. *Auditor General v. Pendill*, 123 Mich. 521 (82 N. W. Rep. 260). *Burns' Ind. Rev. Stat. 1894, §§ 8531, 8560, 8570, 8600 (Rev. Stat. 1901, §§ 8531, 8560, 8570, 8600)*, providing for adding omitted property to the tax duplicate, do not authorize charging the owner of such property with the penalties and interest which would have accrued on the taxes on such property had it been included in the tax duplicates at the proper time. *Gallup v. Schmidt*, 154 Ind. 196 (56 N. E. Rep. 443). The court say: "As said in *Redwood Co. v. Winona & St. Peter Land Co.*, 40 Minn. 512, 524 (42 N. W. Rep. 473, 477): 'One thing is very certain,—that a penalty in any form cannot be imposed until a party is in default of some legal duty. A penalty for the nonpayment of a tax cannot be imposed until the person has an opportunity to pay it,

and fails to do so.' It is a misnomer to call such a charge a 'delinquent tax.' It was not a tax at all until after the assessment and extension were made. Before that time the claim existed only in the right to tax, and not until molded by the forms of law into a fixed charge was it susceptible of demand and exact payment. The assessment and charge may be made for any year or any number of years, but, whenever made, it is to be placed and extended upon the current duplicates for collection, as other taxes. So says the statute. No penalty is prescribed by the legislature for the failure of the taxpayer to timely list his property, and none can be imposed by the tax officer or by the courts. *Redwood Co. v. Winona & St. Peter Land Co.*, 40 Minn. 512, 524 (42 N. W. Rep. 473, 477); *Danforth v. McCook Co.*, 11 S. Dak. 258 (76 N. W. Rep. 940; 74 Am. St. Rep. 808); *Elliott v. Railroad Co.*, 99 U. S. 573 (25 L. Ed. 292); *State v. California Min. Co.*, 13 Nev. 203."

3 Starr & C. Ann. Ill. Stat., p. 3516, § 276; Laws 1899, pp. 45, 47, §§ 25, 27, 35, construed and applied—assessment of omitted property—power of board of review. *Sellers v. Barrett*, 185 Ill. 466 (57 N. E. Rep. 422). Me. Rev. Stat., ch. 6, § 142 construed and applied—omissions and irregularities in assessments—remedies by property owners. *Emery v. Inhabitants of Sanford*, 92 Me. 525 (43 Atl. Rep. 116). Miss. Code, § 3799 construed and applied—reduction of assessment on account of overvaluation or deterioration in the value of land. *Forsdick v. Board of Sup'rs*, Miss. (25 So. Rep. 294). Va. Code, § 479 construed and applied—assessment of omitted property by tax commissioner. *Douglas Co. v. Commonwealth*, 97 Va. 397 (34 S. E. Rep. 52).

**Sec. 821. Assessment of taxes—Boards of equalization.** The failure of the board of equalization to meet at the precise time fixed by the statute does not render an assessment invalid. *Mills' Ann. Colo. Stat.*, § 3790 applied. *Duggan v. McCullough*, 27 Colo. 43 (59 Pac. Rep. 743). Construing and applying Kan. Gen. Stat. 1897, ch. 158, §§ 132, 135, it is held that whenever the valuation of taxable property in any county is changed by the state board of equalization, the board of county commissioners of such county are authorized to use the valuation so fixed by the



state board as a basis for making their levies for all purposes, but are not bound so to do; and section 1 of article 11 of the constitution is not violated by the action of local taxing authorities refusing to adopt the valuations fixed by the state board in making their levy for the current expenses of the county, or for any other purpose, except state taxes. *Board of Com'rs v. Missouri, K. & T. Ry. Co.*, Kan. (61 Pac. Rep. 693). Courts will not interfere with the action of officers composing a board of equalization under Mont. Pol. Code, §§ 3700, 3780-3785, to correct mere errors of judgment; it is only where they act fraudulently or maliciously or the error or mistake is so gross as to be inconsistent with the exercise of honest judgment, that courts will grant relief. *Danforth v. Livingston*, 23 Mont. 558 (59 Pac. Rep. 916). Citing, *Cooley, Tax'n* (2nd Ed.) pp. 409, 410; *Welty, Assessm.* § 137; 2 *Desty, Tax'n*, 655; *Insurance Co. v. Pollak*, 75 Ill. 294; *Porter v. Railroad Co.*, 76 Ill. 561; *Gage v. Evans*, 90 Ill. 570; *Trust Co. v. Weber*, 96 Ill. 346; *Gas Co. v. January*, 57 Cal. 616; *Attorney General v. Supervisors*, 42 Mich. 72 (3 N. W. Rep. 260); *Wilmington, C. & A. R. Co. v. Board of Com'rs of Brunswick Co.*, 72 N. C. 10; *Wade v. Commissioners*, 74 N. C. 81; *International & G. N. R. Co. v. Smith Co.*, 54 Tex. 1; *Hamilton v. Rosenblatt*, 8 Mo. App. 237. *Mills' Ann. Colo. Stat.*, § 3825 construed and applied—notice of meeting of board of equalization. *Duggan v. McCullough*, Colo. (59 Pac. Rep. 743).

**Sec. 822. Lien for taxes—Priority—Statutes construed.** In the absence of a statute taxes on real estate are not a lien on the personal property of the owner; and a receiver of an insolvent owner of both personal property and real estate cannot apply the former in payment to taxes due on the latter, over the objection of creditors who are injured thereby. *In re Lord & Polk Chemical Co.*, 7 Del. Ch. 248 (44 Atl. Rep. 775). Applying *Ga. Civ. Code*, § 5424, it is held that when property is sold and conveyed by a common grantor at different times, and to different purchasers, and taxes having a lien on all the property sold are due, the last property sold is primarily bound for the payment of all the taxes due at the time of the last sale. *Merchants' Nat. Bank v. McWilliams*, 107 Ga. 532 (33 S.

E. Rep. 860). That part of Minn. Gen. Stat. 1894, § 1623, by which it was enacted that the lien for taxes on real property should continue until the same were paid, does not affect the provision of the statute of limitations applicable, under previous decisions, to taxes and tax judgments. *State v. Bellin*, 79 Minn. 131 (81 N. W. Rep. 763). Construing numerous statutory provisions of Virginia, it is held that taxes assessed against real estate are a lien only on the estate of the person against whom they are assessed, and hence taxes assessed during the estate of the life tenant against him are not a lien against the remainderman's interest. *Tabb v. Commonwealth*, 98 Va. 47 (34 S. E. Rep. 946; 51 L. R. A. 283). A statute (3 N. J. Gen. Stat., p. 3359, par. 368) giving a tax lien priority over other incumbrances does not apply to prior liens for taxes held by the state. *Smith v. Specht*, 58 N. J. Eq. 47 (42 Atl. Rep. 599). Ia. Laws 25th Gen. Assem., ch. 62 construed and applied—priority of lien for tax assessed against persons engaged in and property used for the sale of intoxicating liquors. *Ferry v. Deneen*, Ia. (82 N. W. Rep. 424). Under Minn. Gen. Stat. 1894, § 1623, the lien for taxes of a current year attaches on the first day of May; and such lien is not divested by the sale of the property to a corporation whose property is exempt from general taxation. *State v. Northwestern Tel. Exch. Co.*, 80 Minn. 17 (82 N. W. Rep. 1090).

**Sec. 823. Lien for taxes—Discharge by payment—Giving check.** A partial payment of taxes assessed against land by the owner thereof which is returned to him before the land is returned as delinquent, does not affect the lien of the state for the entire tax nor invalidate a sale of the land for the same. *Sayers v. O'Connor*, 124 Mich. 256 (82 N. W. Rep. 1044). A lien for taxes is not discharged by the giving of a check for their payment until it has been presented and paid. *Moore v. Auditor General*, 122 Mich. 599 (81 N. W. Rep. 561). The court say: "Mr. Justice Cooley lays down the rule that: 'A tax collector has no authority to receive anything in payment of taxes but such money as at the time is legal tender, or at least passes current. He has no right to receive the promissory notes of individuals; and a bank check is only conditional pay-

ment, and taxes will remain in force if the check is dishonored.' Cooley, Tax'n, p. 452. This doctrine is recognized in *Kahl v. Love*, 37 N. J. L. 5; *Alkan v. Bean*, 8 Biss. 83 (Fed. Cas. No. 202); *Koonen v. District of Columbia*, 4 Mackey, 339 (54 Am. Rep. 278). The doctrine of those cases is that where an attempt has been made to pay taxes by check, and for any reason the check is not paid, the tax continues to be a lien upon the lands in question, and the lands may be sold, as in ordinary tax proceeding, for the payment of the taxes so remaining a lien."

**Sec. 824. Payment of taxes by mortgagee—Rights and lien acquired.** Applying Ill. Rev. Stat., ch. 120, § 177 providing that "all real estate upon which taxes remain due and unpaid on the 10th day of March annually, \* \* \* shall be delinquent," it is held that the mortgagee may pay the taxes on the mortgaged property unpaid after that date and include the amount in his mortgage, although it is stipulated therein that the mortgagor is to pay the taxes and deliver the receipts to the mortgagee on or before the first day of May. *Louthridge v. Northwestern Ins. Co.*, 180 Ill. 267 (54 N. E. Rep. 153). Construing and applying Wis. Rev. Stat., § 1158, providing that when a lienholder shall pay taxes on the land he shall have a further lien for the amount so paid with interest, it is held that a second mortgagee paying taxes on the mortgaged premises, thereby acquires simply a "further lien" upon the land as against the mortgagor and all persons then claiming under him; not a lien independent of his mortgage lien, or superior to it or to that of the first mortgage, but of the same nature as his mortgage, and constituting simply an addition to the mortgage debt of the amount due on the certificate when he acquired it. But the lien of such a mortgagee for the taxes so paid is not extinguished by a foreclosure sale under the first mortgage at which the first mortgagee purchases the property, where he had knowledge of such tax lien and his complaint of foreclosure simply alleged that the premises had been sold for taxes; but such a purchaser must reimburse the mortgagee for the taxes he has paid before he will be entitled to a decree setting aside the tax certificate as a cloud on his title. *Hill v. Buffington*, 106 Wis. 525 (82 N. W. Rep. 712). For particular case as

to the rights, duties and liabilities of mortgagor and mortgagee in respect to the payment of taxes, see *First Nat. Bank v. Gillam*, 123 Mich. 112 (81 N. W. Rep. 979).

**Sec. 825. Publication of delinquent list—Notice of tax sale.** *Mansf. Ark. Dig.*, §§ 5762, 5763 construed and applied—publication of delinquent list—recording of list and certificate of publication in the clerk's office. *Logan v. Eastern Arkansas Land Co.*, 68 Ark. 248 (57 S. W. Rep. 798). *Mich. Comp. Laws*, §§ 3884, 3888 construed and applied—cost of advertising delinquent lands. *Sayers v. O'Connor*, Mich. (82 N. W. Rep. 1044). A sale made in pursuance of a notice published in the Dutch language when the law requires such publication to be in the English language, is illegal. *Gurd v. Auditor General*, 122 Mich. 151 (80 N. W. Rep. 1005). An advertisement for the sale of land for taxes, describing it under columns with the captions, "Parts of Sec., Sec., Tp., R., Area," as "E. 2 S. E. 12 20 32 80," respectively, and giving the name of the owner, describes the land sufficiently. *Boles v. McNeil*, 66 Ark. 422 (51 S. W. Rep. 71). *Ia. Code 1873*, §§ 873, 880 construed and applied—publication and posting notice of tax sale. *Davis v. Magoun*, 109 Ia. 308 (80 N. W. Rep. 423). *La. Laws 1888*, No. 85, §§ 50, 51 construed and applied—notice of tax sale. *In re City of New Orleans*, 51 La. Am. 972 (25 So. Rep. 686). *S. Dak. Comp. Laws*, § 1620; *Laws 1891*, ch. 14, § 104, construed and applied—notice of tax sale. *Mather v. Darst*, 13 S. Dak. 75 (82 N. W. Rep. 407).

**Sec. 826. Sale of land for taxes—Miscellaneous notes.** Proceedings for the collection of taxes are necessarily summary and ex parte, and hence the rule is universal that all statutory requirements must be strictly and punctiliously complied with, in order to authorize the sale of land therefor. *Hughes v. Linn County*, 37 Or. 111 (60 Pac. Rep. 843). Property in the hands of a receiver appointed by the court in foreclosure proceedings cannot be sold to pay delinquent taxes except by proceedings in such court or with its consent. *Tenn. Laws 1897*, ch. 1, §§ 86, 88 construed and applied. *Weaver v. Duncan*, Tenn. (56

S. W. Rep. 39). One in possession of land claiming title under a recorded deed at the time of the assessment of taxes against the same, proceedings to enforce them and sale of the land thereunder, all of which are had against the vendor of his vendor, and to which he was not a party and of which he had no notice, may assert his title against a tax title based thereon, although the deed to his vendor was not of record. *Armstrong v. Exum*, Tenn. (52 S. W. Rep. 1024). In Arkansas land sold to the state as forfeited for taxes is not subject to sale for subsequent taxes. *Muskegon Lumber Co. v. Brown*, 66 Ark. 539 (51 S. W. Rep. 1056). A statute (Mich. Laws 1885, No. 17) providing for the sale of lands for delinquent taxes cannot be given a retroactive effect. *Norris v. Hall*, 124 Mich. 170 (82 N. W. Rep. 832). Miss. Code 1892, § 3813 construed and applied—sale of land by subdivisions. *Higdon v. Salter*, 76 Miss. 766 (25 So. Rep. 864). Neb. Comp. Stat. 1899, ch. 77, art. 1, § 112 construed and applied—private sale of real estate by county treasurer—filing return showing sale by public auction as a prerequisite. *Medland v. Linton*, 60 Neb. 249 (82 N. W. Rep. 866). The failure of a sheriff's affidavit attached to his return of delinquent taxes to show that upon diligent inquiry he has not been able to discover any goods or chattels belonging to the delinquent upon which to levy, as required by Hill's Ann. Or. Laws, § 2811, renders void a warrant subsequently issued to him on such return so far as it commands him to levy upon and sell the real estate of the delinquent. *Hughes v. Linn County*, 37 Or. 111 (60 Pac. Rep. 843). Ark. Laws 1893, p. 166, §§ 2, 3 construed and applied—payment of taxes on land sold after expiration of right of redemption as condition precedent to confirmation of sale. *Porter v. Tallman*, 68 Ark. 211 (56 S. W. Rep. 1071).

**Sec. 827. Who may purchase at tax sale.** Where land owned by two in severalty is taxed as one parcel, a mortgagee of one owner cannot purchase the entire parcel at a tax sale so as to divest the title of the other owner. *Cone v. Wood*, 108 Ia. 260 (79 N. W. Rep. 86; 75 Am. St. Rep. 223). Citing, *Lewis v. Ward*, 99 Ill. 525; *Cooley v. Waterman*, 16 Mich. 366. In Georgia it is held that a

grantee in a security deed may purchase at a tax sale under a tax execution issued against his vendee in possession under a bond for title for taxes assessed in his name which he failed to pay. *Bank of University v. Athens Sav. Bank*, 107 Ga. 246 (33 S. E. Rep. 34). A mortgagee cannot purchase the mortgaged premises at a tax sale and assert the tax title against his mortgagor, but such a purchase amounts only to a redemption from the sale. *Porter v. Corbin*, 124 Mich. 201 (82 N. W. Rep. 818). In Missouri it is held that a purchase by a tax collector is not invalid as against public policy. *Turner v. Gregory*, 151 Mo. 100 (52 S. W. Rep. 234); but, under Illinois Revenue Act, § 12, a purchase by a tax collector at his own sale is void, *Maher v. Brown*, 183 Ill. 575 (56 N. E. Rep. 181). Construing Mich. Laws 1893, pp. 393, 396, §§ 79, 88, and Laws 1895, p. 309, as amended by Laws 1897, p. 22, it is held that neither a county treasurer nor his deputy can purchase at a tax sale of state lands. *Wait v. Gardiner*, 123 Mich. 236 (81 N. W. Rep. 1098). Under Okla. Stat. 1893, § 5660, a county can purchase land at a tax sale through its treasurer only when there are no other bidders offering the amount due, and a tax deed which recites a sale to the county as a competitive bidder is void on its face. *Hanenkratt v. Hamil*, 10 Okla. 219 (61 Pac. Rep. 1050). For exhaustive collation of authorities on "Who may purchase and enforce a tax title," see 75 Am. St. Rep. 229-253.

**Sec. 828. Right of tenant to purchase at tax sale.**

Where a statute (3 N. J. Gen. Stat., p. 3287) makes a tenant personally liable for taxes on the leased premises, and authorizes him to deduct the same from the rent after he has paid them, it is held that a person in possession of lands enjoying the rents and profits thereof, either as tenant or without attorning to any one, cannot purchase the premises at a tax sale and hold them as against the real owner. *Smith v. Specht*, 58 N. J. Eq. 47 (42 Atl. Rep. 599). In discussing this subject the court say: "But, independent of his liability by the statute to pay the taxes, the mere fact that he was in possession as tenant of Masten, or of anybody else, or in possession without having attorned to any person, but all the time receiving the rents and profits, prevented him from purchasing the

premises at a tax sale, and holding them against the real owner. At any rate, it put upon him, and upon Specht, claiming under him, the burden of proving that he had paid the rent in good faith to another person, supposed to be the landlord, without claiming or receiving any allowance for the taxes. The general principle is that one who is under either a moral or legal obligation to pay the taxes, or is in any wise interested in the premises, cannot buy the tax title, and thereby cut off the title of another party interested, however the interest of either may arise. The subject is treated by Mr. Black (H. C.) in his book on Tax Titles (2nd Ed., §§ 288, 289), and, while there is some contrariety of decision on the subject, I think the clear weight of authority and the better reasoning are in favor of the rule as stated. Mr. Black says 'that although it is the duty of the landlord to pay the taxes assessed, in the absence of any agreement to the contrary between the parties, yet the tenant will not be permitted to take advantage of the omission of his landlord to pay the taxes, to terminate the relation between them and obtain title to the land.' He cites and reviews the authorities, which are numerous. The following seem to sustain the rule as stated:

In *Horner v. Dellinger*, 18 Fed. Rep. 493, the land was held subject to a perpetual ground rent, and the owner conveyed subject to the ground rent, and took back a mortgage. There was no express contract between the owner of the fee and the holder of the rent charge as to the payment of the taxes. While the mortgagor was in possession under his title the taxes fell in arrears, and the premises were sold for their nonpayment, and purchased by a third party, who held for the benefit of the mortgagee, and afterward the mortgagor released to the mortgagee, who thus became reinvested with the title. It was held he could not set up the tax title against the owner of the rent charge. The discussion of the question is found on pages 501, 502. I think the reasoning of the learned judge is unanswerable. *Gaskins v. Blake*, 27 Miss. 675, is an instructive case. That goes the length of holding that if a tenant is indebted to his landlord for any rent in arrear, and buys at a tax sale, the presumption will be that he pays the taxes out of the rent due, whether the taxes accrued during the time of his occupancy or not; and it was

further held that if he was in possession without admitting any tenancy, as a trespasser, he was also incapable of purchasing the land on a sale for taxes and holding against the true owner. The result is summed up thus by the learned judge: 'It is immaterial, therefore, in what light the question may be viewed. If the defendant is treated as a tenant, then his deed clearly gave him no title. If he takes the ground that he was a trespasser, neither the policy of the law, nor sound morality, will permit such a defense. And, finally, if he takes the ground that he supposed himself to be the owner of the land, then, to be consistent with such position, he must admit that it was his duty to pay the taxes, and that the plaintiffs were not in this respect in default.'

In *Waggener v. McLaughlin*, 33 Ark. 195, it was held that a tenant might buy land sold for taxes accruing during his tenancy without his fault,—that is, sold by reason of the default of his landlord,—and set up his title thus acquired against his landlord, but that in equity he would be treated as a trustee for the landlord, and compelled to allow redemption, and would not be allowed to speculate on his purchase, or receive more than 6 per cent. interest on the sums paid for taxes, nor penalties and costs on subsequent taxes paid. In *Duffit v. Tuhan*, 28 Kan. 292, the case was this: The owner of a lot of land permitted a poor woman to occupy it free of rent, during his pleasure. She, or some one in her behalf, erected a small house upon it, and she occupied it free of rent for upwards of 10 years, and without any express covenant on her part to pay the taxes. During that time the taxes fell in arrear, the premises were sold to pay them and she purchased at the sale. It was held that she could not hold the title against the true owner. The court said that the landlord could hardly have supposed that, by permitting the party to occupy the premises free of rent, she would neglect her own possession, and fail to pay the taxes, and then attempt to cut off the title of her benefactor by buying at the tax sale. That reasoning applies here. *Lacey v. Davis*, 4 Mich. 140 (66 Am. Dec. 524), is another case in the same direction.

The subject is elaborately discussed by Chief Justice Durfee, in speaking for the supreme court of Rhode Island, in *Hall v. Westcott*, 15 R. I. 373 (5 Atl. Rep. 629). It was



there held that a mortgagee, out of possession, cannot become a purchaser at a tax sale of the premises and acquire title against the mortgagor. He put it on the ground that a purchaser who has an interest in the estate, such as would entitle him to redeem if sold to another, will be presumed to have purchased it for the protection of that interest, or to save it from sacrifice, and will be required to hold it, even after the statutory period for redemption has expired, simply as security for his reimbursement. The chief justice refers to numerous cases, among others, *Woodbury v. Swan*, 59 N. H. 22, in which this language is used: 'A mortgagor and mortgagee have a unity of legal interest in the protection of their titles against sales for nonpayment of taxes and against outstanding tax titles, and it is not equitable that either of them should act adversely to the other in the acquisition and use of such titles.' In *Laton v. Balcom*, 64 N. H. 92 (6 Atl. Rep. 37; 10 Am. St. Rep. 381), it was held that a husband could not acquire a title by tax sale of the land of his wife. The facts of the case were that the wife was the holder of a mortgage on land of the plaintiff which she had foreclosed and afterward released to the mortgagor. While she was such mortgagee, the land was sold to pay the taxes, and her husband bought the premises. It was held that he could not hold them against the mortgagor. *Langley v. Chapin*, 134 Mass. 82, is in the same general direction."

**Sec. 829. Title and rights of purchaser at tax sale.** A purchase at a tax sale is regarded as a contract, and the purchaser is entitled to the rights given to him by the statutory provisions existing at the time of his purchase; and these rights cannot be taken away by a subsequent statute without impairing the obligations of the contract. *Roberts v. First Nat. Bank*, 8 N. Dak. 474 (79 N. W. Rep. 1049). Citing, *Morgan v. Commissioners*, 27 Kan. 89; *Forqueran v. Donnally*, 7 W. Va. 114, *Merrill v. Dearing*, 32 Minn. 479 (21 N. W. Rep. 721); *Robinson v. Howe*, 13 Wis. 341. In Minnesota it is held that where lands have been sold for taxes, and bid in for the state, and the state subsequently assigns all rights and interests acquired by it under such sale to an individual, who thereafter perfects the title thereunder, the state cannot impeach or impair

such title by a resale of the lands for taxes due and unpaid for prior years. *State v. Camp*, 79 Minn. 343 (82 N. W. Rep. 645). But in a later case, distinguishing this decision, it is held that a purchaser at a tax sale, as well as a person who procures an assignment from the state after lands have been bid in at a tax sale, takes a certificate of purchase or an assignment subject to the statutory right of the state to enforce the collection of a prior tax, when refundment has been made on account of a void sale as provided in Gen. Stat. 1894, §§ 1610, 1697. *State v. Kipp*, 80 Minn. 119 (82 N. W. Rep. 1114). In the case of *Emons v. Bennett*, 9 N. Dak. 131 (81 N. W. Rep. 22), the supreme court of North Dakota say: "It may be stated as an established principle that the interest which a purchaser of lands at a tax sale acquires is, in the absence of a statute to the contrary, freed from liability for delinquent taxes of previous years, and that a tax deed regularly issued cuts off all interests acquired by purchasers at tax sales for taxes prior to that upon which the tax deed is based. *Preston v. Van Gorder*, 31 Ia. 250; *Bowman v. Thompson*, 36 Ia. 505; *Kessey v. Connell*, 68 Ia. 430 (27 N. W. Rep. 365); *Meldahl v. Dobbin*, 8 N. Dak. 115 (77 N. W. Rep. 280); *Jarvis v. Peck*, 19 Wis. 74; *Sayles v. Davis*, 22 Wis. 225; *Irwin v. Trego*, 22 Pa. St. 368; *Huzard v. Trego*, 35 Pa. St. 9; *Anderson v. Rider*, 46 Cal. 135; *Law v. People*, 116 Ill. 244 (4 N. E. Rep. 845)."

The rule of caveat emptor applies to a purchaser at a tax sale. *McHenry v. Brett*, 9 N. Dak. 68 (81 N. W. Rep. 65). A sale for taxes assessed against property which is exempt from taxation is absolutely void, and a purchaser thereat acquires no lien and cannot acquire a lien by the payment of subsequent taxes. N. Dak. Comp. Laws, §§ 1626, 1635 construed and applied. *McHenry v. Brett*, 9 N. Dak. 68 (81 N. W. Rep. 65). One in possession of land under a contract of sale who purchases the same at a tax sale for taxes assessed before the making of his contract of purchase takes the title for the benefit of his vendor. *Curran v. Banks*, 123 Mich. 594 (82 N. W. Rep. 247). Until a purchaser at a tax sale obtains a deed no title passes to him; he cannot maintain an action to quiet his tax title or set it up as a defense against the original owner. *Boardman v. Boozewinkel*, 121 Mich. 320 (80 N. W. Rep. 37).

In Michigan a purchaser may gain possession by application for a writ of assistance. *Beck v. Finn*, 122 Mich. 21 (80 N. W. Rep. 785). Illinois Revenue Act, § 211 construed and applied—effect of purchaser's forfeiture of lands to the state for nonpayment of taxes. *Maher v. Brown*, 183 Ill. 575 (56 N. E. Rep. 181). Ohio Rev. Stat., §§ 1025, 1159, 2875, 2888 construed and applied—title conferred by certificate of purchase at tax sale—assignment and transfer of certificate—duty of auditor as to transfer. *State v. Godfrey*, 62 O. St. 18 (56 N. E. Rep. 482). A quitclaim deed by one holding under a certificate of tax sale operates merely as an assignment of such certificate. *Boardman v. Boozewinkel*, 121 Mich. 320 (80 N. W. Rep. 37).

**Sec. 830. Rights and remedies of purchaser at invalid tax sale.** A purchaser of real estate for taxes legally assessed acquires a lien on the property which is not defeated by mere irregularities in conducting the sale, *Sanford v. Moore*, 58 Neb. 654 (79 N. W. Rep. 548); and in this state it is held that even a void sale transfers the lien of the public or county to the purchaser; also the rights and remedies inclusive of the right of action for foreclosure of the lien, *Merrill v. Ijams*, 58 Neb. 706 (79 N. W. Rep. 734). The right of a purchaser at a tax sale to recover from the county the purchase money paid by him upon failure of title is statutory. *Nevada County v. Dickey*, 68 Ark. 160 (56 S. W. Rep. 779). There is no rule of law or maxim of equity which the holder of a tax title may invoke to compel the owner of the property to reimburse him for the amounts he has invested in the venture, except in the event the property owner asks the aid of a court of equity to cancel the tax purchases, liens and deeds as a cloud upon his title to the property. *Gage v. Eddy*, 186 Ill. 432 (57 N. E. Rep. 1030). The right of a purchaser at a tax sale to recover subsequent taxes paid must be based upon some lien acquired by his purchase and does not exist where the sale at which the purchase was made was absolutely void. *McHenry v. Brett*, 9 N. Dak. 68 (81 N. W. Rep. 65). Ill. Law 1881, p. 149 applied—recovery of interest by holder of tax title upon his deed being declared invalid. *Glos v. Gould*, 182 Ill. 512 (55 N. E. Rep. 369). Under Mich. Laws 1893, No. 206, § 73, upon the setting

aside of a tax sale, the purchaser is entitled to have refunded to him the amount paid at the time of the sale together with all subsequent taxes which he has paid. *Auditor General v. Patterson*, 122 Mich. 39 (80 N. W. Rep. 884). A statute (2 Wag. Mo. Stat., p. 1206, § 219) requiring one recovering land sold for taxes to pay to the person claiming under the tax deed all taxes paid by the purchaser at the time of the sale and subsequent thereto, and redemption money and interest, does not apply where the taxes which the purchaser paid were illegal because the tax books had not been authenticated, as required by 2 Wag. Mo. Stat. 1872, p. 1171, § 65. *Burke v. Brown*, 148 Mo. 309 (49 S. W. Rep. 1023). Citing, *Barber v. Evans*, 27 Minn. 92 (6 N. W. Rep. 445); *Philleo v. Hiles*, 42 Wis. 527; *Marsh v. Supervisors*, 42 Wis. 502; *Tierney v. Lumbering Co.*, 47 Wis. 248 (2 N. W. Rep. 289); *Roberts v. Deeds*, 57 Ia. 320 (10 N. W. Rep. 740). N. Dak. Laws 1890, ch. 132, § 84 construed and held constitutional—right of purchaser to recover payments made on an illegal tax sale. *Paine v. Dickey County*, 8 N. Dak. 581 (80 N. W. Rep. 770). N. Dak. Laws 1897, ch. 126, § 88 construed and applied—recovery by purchaser in case of failure of title. *Roberts v. First Nat. Bank*, 8 N. Dak. 474 (79 N. W. Rep. 1049).

**Sec. 831. Tender and payments required of one recovering land from the holder of an invalid tax title.** One assailing a tax title in a proceeding to foreclose a mechanic's lien must show a tender to the holder thereof of the taxes paid or the expenses incurred by him, before the filing of the suit. *Glos v. John O'Brien Lumber Co.*, 183 Ill. 211 (55 N. E. Rep. 712). Construing and applying Ia. Code 1873, § 897, providing that no person shall be permitted to question the title acquired by a tax deed "without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property have been paid by such person or the person under whom he claims title as aforesaid," it is held that a mortgagee acquiring title by purchase at foreclosure of his own mortgage, by the introduction of such proceedings,

does not make a sufficient showing to entitle him to set aside a tax deed and to redeem from a tax sale made after the expiration of the time for redemption from the foreclosure sale. *Peterborough Sav. Bank v. Des Moines Sav. Bank*, 110 Ia. 519 (81 N. W. Rep. 786). Bal. Ann. Wash. Codes & Stat., §§ 5678-5680 construed and applied—payment or tender required of parties seeking to recover property sold for taxes. *Merritt v. Corey*, 22 Wash. 444 (61 Pac. Rep. 171).

**Sec. 832. Irregularities sufficient to avoid or invalidate a tax sale.** The failure of the sheriff to append to his return of delinquent lands the affidavit prescribed by statute invalidates a subsequent sale thereof by him at which he purchases on behalf of the state. *McGhee v. Sampselle*, 47 W. Va. 352 (34 S. E. Rep. 815). A statement at a tax sale which prevents competition will defeat a title thereunder. *Bickford v. Poor*, 68 N. H. 443 (44 Atl. Rep. 600). The court say: "The case finds as a fact that the defendant's statement made at the sale prevented competition. This fact is fatal to the defendant's title. 'The sale must be a public sale, with opportunity for open competition.' *Cooley, Tax'n*, 339. 'It is essential to the validity of tax sales, not merely that they should be conducted in uniformity with the requirements of law, but that they should be conducted with perfect fairness. Perfect freedom from all influences likely to prevent competition in the sale should be in all cases strictly exacted.' *Slater v. Maxwell*, 6 Wall. 268, 276. This case, decided in the supreme court of the United States, and supported by the authorities generally (*Burroughs, Tax'n*, 351; *Black, Tax Titles*, §§ 397-399; *Kerwer v. Allen*, 31 Ia. 578), is decisive of the present case."

A sale made without recording in the clerk's office the list of lands delinquent and notice of sale thereof with certificate of its publication, as required by *Mans. Ark. Dig.*, § 5763, is void. *Logan v. Eastern Arkansas Land Co.*, 68 Ark. 248 (57 S. W. Rep. 798). Under Ark. Laws 1871, pp. 162-164, 187, a tax collector has no authority to sell lands delinquent for taxes for any costs except the cost of advertising. *Muskegon Lumber Co. v. Brown*, 66 Ark. 539 (51 S. W. Rep. 1056). Under 3 Starr & C. Ill. Ann.

Stat. (2nd Ed.) p. 3480, a tax sale made on a certificate of the county clerk, certifying that the taxes for which the land was sold were unpaid, is insufficient to support a tax title, where the certificate does not show clearly that it was made on the day of the sale. *Kepley v. Scully*, 185 Ill. 52 (57 N. E. Rep. 187). Under Ia. Code 1873, § 854, delinquent taxes must be brought forward on the tax lists and "any sale for the whole or any part of such delinquent taxes not so entered shall be invalid;" and under § 875, a tax deed which shows on its face that two separate parcels of land were sold as one tract is void. *Hintrager v. McElhinny*, Ia. (82 N. W. Rep. 1008). A sale is void where a part of the tax for which it is made is illegal. *Fish v. Genett*, Ky. (56 S. W. Rep. 813). Mich. Comp. Laws, § 3893 construed and applied—defects sufficient to set aside a sale after confirmation. *Burns v. Ford*, Mich. (82 N. W. Rep. 885). A sale of lands, under Minn. Gen. Stat. 1894, §§ 1616, 1617, for taxes, the state's lien for which has been lost by the statute of limitations, is invalid. *State v. Bellin*, 79 Minn. 131 (81 N. W. Rep. 763). A sale of land in Mississippi for the war taxes of 1861, being in aid of the rebellion, is void, *Bookout v. Andrews*, Miss. (25 So. Rep. 865); and in this state a sale, as one tract, of lands widely separated and of differing values, though owned by the same person, is void, *Speed v. McKnight*, 76 Miss. 723 (25 So. Rep. 872). A sale of real estate by a county treasurer under a tax list to which the county clerk has not attached his warrant, as required by Okla. Stat. 1893, § 5631, is void. *Frazier v. Prince*, 8 Okla. 253 (58 Pac. Rep. 751); *Morrow v. Smith*, 8 Okla. 267 (61 Pac. Rep. 366). W. Va. Code, ch. 31, §§ 25-27 construed and applied—irregularities sufficient to set aside a tax deed. *Gerke Brewing Co. v. St. Clair*, 46 W. Va. 93 (33 S. E. Rep. 122). Particular levy of a tax execution held void on account of the value of the property levied upon grossly exceeding the amount of the tax. *Hobbs v. Hamlet*, 106 Ga. 403 (32 S. E. Rep. 351).

**Sec. 833. Irregularities insufficient to invalidate a tax sale.** Applying Mich. Laws 1893, p. 389, § 70; p. 399, § 99, it is held that a tax sale is not invalidated by the failure to attach a certified copy of the decree to the tax record.

*Gates v. Johnson*, 121 Mich. 663 (80 N. W. Rep. 709). Mich. Laws 1893, No. 206, § 99 construed and applied—tax sale not rendered invalid by failure to find documents connected therewith in proper office. *McFadden v. Brady*, 120 Mich. 699 (79 N. W. Rep. 886). A lot owner is not entitled to an injunction against a tax sale because the assessment upon which it is based assesses several lots in gross instead of separately, as required by Mont. Laws 1889, p. 219, § 5, where it does not appear that he made any attempt to have the irregularity corrected by the board of equalization, as he was entitled to do under Laws 1887, p. 82, § 22. *Deloughrey v. Hinds*, 23 Mont. 260 (58 Pac. Rep. 709); *Cobban v. Hinds*, 23 Mont. 338 (59 Pac. Rep. 1). Mont. Pol. Code, §§ 4023-4026 construed and applied—grounds for injunction against tax sale. *Cobban v. Hinds*, 23 Mont. 338 (59 Pac. Rep. 1). Under Neb. Comp. Stat., ch. 77, art. 1, § 142 a tax sale of land privately made by the officer instead of publicly is irregular but not invalid. *Sanford v. Moore*, 58 Neb. 654 (79 N. W. Rep. 548).

**Sec. 834. Setting aside tax sale—Practice.** Equity will not entertain a petition by an owner of land to cancel a tax sale thereof brought more than two years after he had full knowledge of all the facts. The rights of parties who subsequently have bought the products of lands sold for taxes, either from the original owner or the tax title owner, cannot be litigated in a proceeding by the original land owner to set aside the sale. *Cook v. Hall*, 123 Mich. 378 (82 N. W. Rep. 59). A court which has acquired jurisdiction of the parties and subject-matter in an action to set aside as a cloud upon the title of property an illegal sale thereof to pay a municipal assessment, in addition to setting aside the sale, may correct the illegal assessment. *Brennan v. City of Buffalo*, 162 N. Y. 491 (57 N. E. Rep. 81). The reversal of a judgment setting aside a tax sale embracing two lots claimed by two different persons, upon an appeal by one of them operates as a reversal as to both and their subsequent rights are to be determined accordingly. *Glos v. O'Toole*, 184 Ill. 585 (56 N. E. Rep. 827).

**Sec. 835. Right to redeem from tax sale—Effect of disabilities.** One cannot claim an enlargement of the statutory rights given him to redeem from a tax sale, on the ground of his mental incompetency at the time of the proceedings resulting in the sale, *Dumphy v. Hilton*, 121 Mich. 315 (80 N. W. Rep. 1); nor on account of his minority, *Dawson v. Dawson*, 106 Ga. 45 (32 S. E. Rep. 29). In the first case the court say: "Every one knows that his land is subject to taxation. Every one is presumed to know the law. If he fails to pay, he must be held to know that proceedings will be taken to enforce these taxes against his land, and not against him personally. If not paid, he knows that his property will be advertised and sold under a decree in chancery, without reference to further notice to the owner of the land, or to the person against whom it is or may be assessed. Courts cannot read into the revenue laws extensions of time to redeem, exceptions, etc., not found in the law. When the law provides for the sale of all delinquent lands, it applies to the lands of those under disability as well as to others. The cases cited on behalf of complainant are not tax cases. 'The same strict rules apply to persons under disability as to others, unless the statute otherwise provides.' 25 Am. & Eng. Enc. Law, 419. The law of 1893 does otherwise provide. Section 69, Act No. 206, Laws 1893. One feature of this section was construed by the court. *Foegan v. Carpenter*, 117 Mich. 89 (75 N. W. Rep. 290). Similar provisions are found in other states. It was held by the United States supreme court that the right of redemption from tax sales, although it is to be regarded favorably, does not exist, except as permitted by statute. *Keely v. Sanders*, 99 U. S. 441, 445. The same rule was held in New York—*Levy v. Newman*, 130 N. Y. 11, 13 (28 N. E. Rep. 660)—; and also in Arkansas—*Smith v. Macon*, 20 Ark. 17—; and in Iowa—*McGee v. Bailey*, 86 Ia. 513 (53 N. W. Rep. 309)."

**Sec. 836. Redemption from tax sale—Statutes construed.** A purchase at a tax sale by an attorney of a mortgagee of the premises to whom he afterwards quitclaims the premises, amounts merely to a redemption from the sale. *Boardman v. Boozewinkel*, 121 Mich. 320 (80 N. W.



Rep: 37). The owner of land sold at a void tax sale is not required to redeem the land from the purchaser or to pay him the statutory interest allowed in case of redemption. *Fish v. Genett*, Ky. (56 S. W. Rep. 813). In order to effect a redemption by sending money by mail it must appear that the money reached the proper officer within the period allowed for redemption. *Paine v. Boynton*, 124 Mich. 194 (82 N. W. Rep. 816). As to the liability of a purchaser in possession for rent and the right to compensation for improvements upon redemption from the tax sale, see *Hintrager v. McElhinny*, Ia. (82 N. W. Rep. 1008).

The statutory right of a minor to redeem his lands from a tax sale given by Sand. & H. Ark. Dig., § 6615 (Mansf. Dig., § 5772), passes to his grantee, but it can be exercised only by one to whom the minor has voluntarily transferred his interest and does not pass to one purchasing at foreclosure sale of the minor's land. *McConnell v. Swepston*, 66 Ark. 141 (49 S. W. Rep. 566). As to redemption from sale of land for nonpayment of levee district tax assessed under Ark. Laws, Act Feb. 15, 1893, see *Banks v. Directors of St. Francis Levee Dist.*, 66 Ark. 490 (51 S. W. Rep. 830). The year to redeem from a tax sale given by Ga. Pol. Code, § 909, begins to run from the time of the payment of the purchase money by the bidder. *Wood v. Henry*, 107 Ga. 389 (33 S. E. Rep. 410). The right of a mortgagee to redeem from a tax sale, given by Mass. Stat. 1888, ch. 390, § 57, is an interest which, by force of the statute, vests in any person who is a mortgagee at the time of the tax sale, and passes to his heirs or assignees, and is not extinguished by a foreclosure of the mortgage after the sale, but without notice of it. *McGauley v. Sullivan*, 174 Mass. 303 (54 N. E. Rep. 842). 3 N. J. Gen. Stat., p. 3354, par. 338 construed and applied—payments required of redemptioner from tax sale. *Smith v. Specht*, 58 N. J. Eq. 47 (42 Atl. Rep. 599). Tenn. Laws 1895, ch. 120, § 89 construed and applied—redemption from tax sale—tender required. *Ayres v. Dozier*, Tenn. (52 S. W. Rep. 662). A statute (Tex. Laws 1897, ch. 104) requiring one redeeming from a purchaser of land previously sold to the state for taxes to pay interest on the taxes thereon, is not unconstitutional because there was no law authorizing the

collection of interest on the taxes when they were levied. *League v. State*, 93 Tex. 553 (57 S. W. Rep. 34). Va. Code, §§ 469, 664; Laws 1897-8, pp. 513, 514, construed and applied—redemption by previous owner of lands sold to the state. *Dooley v. Christian*, 96 Va. 534 (32 S. E. Rep. 54). Particular facts held to show an abandonment of the right to redeem from a tax sale. *Cooper v. Cook*, 108 Ia. 301 (79 N. W. Rep. 71).

**Sec. 837. Notice of expiration of time to redeem.** A tax deed executed without an affidavit showing compliance with Ill. Const., art. 9, § 5; Rev. Stat., ch. 120, §§ 216, 217, providing for the giving of notice to the owner of the land of the expiration of the time of redemption, is unauthorized. *Palmer v. Riddle*, 180 Ill. 461 (54 N. E. Rep. 227). The same is true where the affidavit required by the statute was fraudulent and defective. *Langlois v. McCullom*, 181 Ill. 195 (54 N. E. Rep. 955). The affidavit of service of notice required by this statute definitely must state that the person served is the owner, and not leave it to inference that he may be regarded as owner; nor is it sufficient to allege service upon a person who, according to the information and belief of the affiant, may have some interest as owner or otherwise in the premises. *Glos v. Gould*, 182 Ill. 512 (55 N. E. Rep. 369). Where the sale is both for taxes and special assessments, the notice must state for what year the tax or assessment was levied and give both the name of the person to whom the land was taxed and that of the person to whom it was specially assessed. *Harrell v. Enterprize Sav. Bank*, 183 Ill. 538 (56 N. E. Rep. 63). Notice of the expiration of the time for redemption from a tax sale, required to be given by Ia. Code 1873, § 894, must be served upon the person in possession and also upon the person in whose name the property is taxed, and notice upon one of several tenants in possession is not sufficient. Proof of such service can be made only by affidavit showing the necessary facts, made by the holder of the certificate of purchase, his agent or attorney. *Hintrager v. McElhinny*, Ia. (82 N. W. Rep. 1008). A notice under this statute is sufficient where one would understand from it that the land is in a certain county of the state, though the state and county are not mentioned

in direct connection with the description of the land; but a notice given by one after his assignment of his certificate of purchase is of no effect. *Sickles v. Union Inv. Co.*, 109 Ia. 450 (80 N. W. Rep. 534). Minn. Gen. Stat. 1894, § 1654 construed and applied—notice of time for redemption. *Knight v. Knoblauch*, 77 Minn. 8 (79 N. W. Rep. 582). This statute is not repealed by Laws 1899, ch. 35, re-enacting § 1617, Gen. Stat. 1894. *Powell v. King*, 78 Minn. 83 (80 N. W. Rep. 850).

**Sec. 838. Certificate of sale and tax deed.** Under Minn. Gen. Laws 1881, ch. 135, a certificate of tax sale is invalid where it does not show that the price for which each lot was sold was the highest sum bid for the same in severalty. *Davis v. Carlin*, 77 Minn. 472 (80 N. W. Rep. 366). For construction of N. C. Laws 1895, ch. 119, § 90, as to the title and rights of an assignee of a certificate of purchase at a tax sale issued to a county, see *Huss v. Craig*, 124 N. C. 743 (32 S. E. Rep. 974); *Whitman v. Dickey*, 124 N. C. 741 (32 S. E. Rep. 974); *Collins v. Bryan*, 124 N. C. 738 (32 S. E. Rep. 975). Under Okla. Stat., §§ 5666, 5667, a tax certificate represents an interest in real estate, and can only be assigned, so as to entitle the assignee to a deed thereon, by the assignor executing such assignment, and acknowledging the same before some officer having power to take acknowledgments of deeds. If the assignment is made by an attorney in fact, the power of attorney must be executed and acknowledged in the same manner that deeds are executed and acknowledged. No mere agent has power or authority to assign and acknowledge the assignment of a tax certificate so as to authorize a tax deed to issue to such assignee. A tax certificate, and a valid assignment thereof, where the assignee claims title under a tax deed, are essential and necessary to the validity of the deed, and to the authority of the taxing powers to divest the title of the former owner or those claiming through him. *Wilson v. Wood*, 10 Okla. 279 (61 Pac. Rep. 1045).

The power of an officer to issue a tax deed, under Mills' Ann. Colo. Stat., § 3900, includes the power to issue a second deed when the first contained an insufficient description of the property; and a purchaser entitled to such second deed will not be required to re-present his certifi-

cate of purchase to the officer. *Duggan v. McCullough*, 27 Colo. 43 (59 Pac. Rep. 743). *Mills' Colo. Stat.*, § 3901 construed and applied—validity of tax deed embracing several noncontiguous tracts—sufficiency of recitals as to separate sale of tracts. *Barnett v. Jaynes*, 26 Colo. 279 (57 Pac. Rep. 703). In order for a tax deed to give to the grantee the statutory rights of a holder of such a deed, it must be attested by the county treasurer, as required by *Ind. Rev. Stat. 1894*, § 8624 (*Rev. Stat. 1901*, § 8624). *Armstrong v. Hufty*, 156 Ind. 606 (55 N. E. Rep. 443). The statutory form of a tax deed in Oklahoma is for voluntary purchasers, and where such deed is based upon a sale to the county it must be modified so as to show the conditions upon which the county lawfully can become the purchaser; and a deed which recites a sale to the county as a competitive bidder is void upon its face. *Henkratt v. Hamil*, 10 Okla. 219 (61 Pac. Rep. 1050).

**Sec. 839. Tax deed—Conclusiveness as evidence of title—Statutes construed.** *Mills' Ann. Colo. Stat.*, § 3902, making a tax deed prima facie evidence of certain things, applies to a tax deed appearing on its face to have been issued upon a tax sale made for delinquent municipal sewer taxes under a special assessment. *United States Sec. & Bond Co. v. Wolfe*, 27 Colo. 218 (60 Pac. Rep. 637). Under *Ind. Rev. Stat. 1894*, § 8624 (*Rev. Stat. 1901*, § 8624), a tax deed regular on its face is prima facie evidence of a good and valid title in fee simple in the grantee of said deed, and constitutes a good defense on his behalf against an action by another to quiet title to the land, who does not allege or prove that the sale was irregular or that the deed was invalid. The fee simple title evidenced by such a deed is not lost or destroyed by the holder thereof securing possession from an occupant who claimed a life tenancy. *Doren v. Lupton*, 154 Ind. 396 (56 N. E. Rep. 849). Where a statute (*Mich. Laws 1882*, No. 7) does not make a tax deed prima facie evidence of title, such a deed is not admissible in evidence without proof of the regularity of the tax proceedings upon which it is based. *Norris v. Hall*, 124 Mich. 170 (82 N. W. Rep. 832).

**Sec. 840. Tax deed—Conclusiveness as evidence of title—Legislative power.** The legislature has no power to declare a tax deed, or the recitals therein, as conclusive evidence of a compliance with those matters which are essential to the exercise of the taxing power, or to those matters which are necessary to be done in order to divest the title of the former owner, or those claiming through him. *Wilson v. Wood*, 10 Okla. 279 (61 Pac. Rep. 1045). The legislature cannot make the recitals in a tax deed conclusive evidence of the regularity of the assessment of the taxes on account of which the sale was made. *Roberts v. First Nat. Bank*, 8 N. Dak. 474 (79 N. W. Rep. 1049). The court say: "An assessment is in the broadest sense a jurisdictional requirement. It is the groundwork of all subsequent tax proceedings. Without it, no taxing officer has jurisdiction to proceed further. The legislature cannot dispense with it, or fix its basis. These matters are grounded in the constitution. Its absence is not a mere irregularity. It is not a measure that the legislature can control, excuse or cure. As to such matters the legislature may make the tax deed conclusive evidence of their performance, but it may not make it conclusive as to any jurisdictional matter. *Raley v. Guinn*, 76 Mo. 263; *Abbott v. Lindenbower*, 42 Mo. 162; *Griffin v. Dogan*, 48 Miss. 11; *Bell v. Coats*, 54 Miss. 539; *Virden v. Bowers*, 55 Miss. 1; *Martin v. Cole*, 38 Ia. 141; *Immegart v. Gorgas*, 41 Ia. 439; *In re Douglass*, 41 La. Ann. 765 (6 So. Rep. 675); *Callanan v. Hurley*, 93 U. S. 387; *Morrill v. Douglass*, 17 Kan. 291; *Ensign v. Barse*, 107 N. Y. 329 (14 N. E. Rep. 400; 15 N. E. Rep. 401); *Bannon v. Barnes*, 39 Fed. Rep. 892; *Black*, Tax Titles, § 432; *Cooley*, Const. Lim. (5th Ed.) top page 458; *Smith v. Cleveland*, 17 Wis. 565; *Brown v. Slauson*, 23 Wis. 245; *Railroad Co. v. Snyder*, 18 O. St. 406."

**Sec. 841. Judicial proceedings to confirm and enforce tax titles.** An answer by a defendant in an action to quiet a tax title in which he alleges that at all times he has been "ready and willing to pay the just and lawful amount of said taxes, tax sales, penalties and interest that were chargeable" on the land, and offers to pay the same into court at any time, avers an absolute and unconditional

tender. *Cone v. Wood*, 108 Ia. 260 (79 N. W. Rep. 86; 75 Am. St. Rep. 223). In Michigan it is held that in an action by the holder of a tax deed to quiet his title thereunder it cannot be shown that it is invalid because the owner attempted to pay the taxes and was prevented from doing so through no fault of his. *McFadden v. Brady*, 120 Mich. 699 (79 N. W. Rep. 886). Ind. Rev. Stat. 1881, § 6496 construed and applied—action to quiet title by a holder of tax title. *Pattison v. Wert*, 153 Ind. 453 (55 N. E. Rep. 227). Mich. Laws 1897, No. 225 construed and applied—notice required before bringing ejectment by the holder of tax title. *Church v. Smith*, 121 Mich. 97 (79 N. W. Rep. 892). Mich. Laws 1897, No. 229 construed and applied—writ of assistance to purchaser—notice to land owner. *Eldridge v. Richmond*, 120 Mich. 586 (79 N. W. Rep. 807).

**Sec. 842. Judicial proceedings to collect taxes.** A suit to enforce the collection of taxes may be lost by laches. *Robinson v. Bierce*, 102 Tenn. 428 (52 S. W. Rep. 992; 47 L. R. A. 275). Ky. Civ. Code Prac., §§ 506-508 construed and applied—revivor of action to enforce tax lien. *City of Louisville v. Woolley*, Ky. (57 S. W. Rep. 499). Minn. Gen. Stat. 1894, § 1585 construed and applied—entry of tax judgment. *Countryman v. Wasson*, 78 Minn. 244 (80 N. W. Rep. 973). Minn. Laws 1899, ch. 322 construed and applied—proceedings to collect taxes by judicial process—verification of pleadings—statute of limitations. *Scott Co. v. Ward*, Minn. (82 N. W. Rep. 686). A tax sale certificate, made pursuant to Minn. Laws 1893, ch. 150, which recites the sale of land pursuant to a tax judgment in proceedings to enforce the payment of taxes upon real estate delinquent in the year 1879 and prior years, and in the year 1889 and prior years, without otherwise indicating for what taxes the judgment was rendered, is void on its face, it appearing from the certificate that the statute of limitations had run against the action to obtain a judgment against the land for taxes delinquent in 1879 and prior years. *Cool v. Kelly*, 78 Minn. 102 (80 N. W. Rep. 861). Title to land standing of record in the name of Singleton V. Turner cannot be divested by proceedings to enforce the state's lien for taxes, under Mo. Rev. Stat. 1889, § 7682, based upon service by publication

against Vaughn Turner, although such owner was commonly known by that name. *Turner v. Gregory*, 151 Mo. 100 (52 S. W. Rep. 234). The summary processes provided by the statutes of North Dakota for the enforcement of taxes are an exclusive remedy, and an action in equity in the nature of a suit to foreclose a mortgage does not lie to foreclose a lien upon land created by a tax levy. *McHenry v. Kidder Co.*, 8 N. Dak. 413 (79 N. W. Rep. 875).

**Sec. 843. Judicial proceedings to collect taxes—Michigan cases.** The fact that the auditor general includes in his petition to foreclose the lien of the state for taxes lands previously bid in by the state will not authorize a collateral attack upon the judgment rendered in the proceeding. *Peninsular Sav. Bank v. Ward*, 118 Mich. 87 (76 N. W. Rep. 161; 79 N. W. Rep. 911). Mich. Laws 1893, No. 206, § 62 construed and applied—appearance of persons desiring to contest the lien of the state for taxes—setting case for hearing. *Ledyard v. Dix*, 121 Mich. 56 (79 N. W. Rep. 918). Mich. Laws 1893, No. 206, § 66 construed and applied—power of court to make orders in the proceedings. *Haven v. Owen*, 121 Mich. 51 (79 N. W. Rep. 938; 80 Am. St. Rep. 477). Mich. Laws 1893, No. 206, § 66 construed and applied—publication of notice of hearing of tax proceedings. *McFadden v. Brady*, 120 Mich. 699 (79 N. W. Rep. 886); *Wait v. McMillan*, 121 Mich. 95 (79 N. W. Rep. 917). See further, on this subject, *Nester v. Church*, 121 Mich. 81 (79 N. W. Rep. 893). Mich. Laws 1895, No. 162, § 66 construed and applied—publication of petition in tax proceedings. *Eldridge v. Richmond*, 120 Mich. 586 (79 N. W. Rep. 807). See *Burns v. Ford*, 124 Mich. 274 (82 N. W. Rep. 885), construing Comp. Laws, §§ 3885, 3889, on the same subject. Particular service of subpoena held insufficient to confer jurisdiction. *Coyle v. O'Connor*, 121 Mich. 596 (80 N. W. Rep. 571). The land owner is entitled to five secular days in which to file objections to the auditor's petition for the tax sale, and a decree rendered in violation of this rule is void. *McGinley v. Calumet & Hecla Min. Co.*, 121 Mich. 88 (79 N. W. Rep. 928); *Miller v. Brown*, 122 Mich. 147 (80 N. W. Rep. 999). If the court is open during the five days for the filing of objections, through being convened by the

clerk and sheriff, it is sufficient, though the judge was not present but would have attended to hear any protests filed. *Gates v. Johnson*, 121 Mich. 663 (80 N. W. Rep. 709). As to the effect on the validity of a tax decree of filling blanks therein after its rendition, see *In re Auditor General*, 120 Mich. 704 (79 N. W. Rep. 910); *Haven v. Owen*, 121 Mich. 51 (79 N. W. Rep. 938; 80 Am. St. Rep. 477); also, *Ballards' Law of Real Property*, Vol. VII, § 816. The general rule against collateral impeachment of judgments applies to a decree in a tax proceeding. *Wilkin v. Keith*, 121 Mich. 66 (79 N. W. Rep. 887); *Peninsular Sav. Bank v. Ward*, 118 Mich. 87 (76 N. W. Rep. 161; 79 N. W. Rep. 911); *Haven v. Owen*, 121 Mich. 51 (79 N. W. Rep. 938; 80 Am. St. Rep. 477); *Hoffman v. Pack*, 123 Mich. 74 (81 N. W. Rep. 934). Particular irregularities held insufficient to set aside a decree for a tax sale. *Shefferly v. Auditor General*, 120 Mich. 455 (79 N. W. Rep. 693). For particular cases on the subject of tax proceedings in Michigan, see *Nester v. Church*, 121 Mich. 81 (79 N. W. Rep. 893); *Mann v. Carson*, 120 Mich. 631 (79 N. W. Rep. 941); *Roberts v. Loxley*, 121 Mich. 63 (79 N. W. Rep. 978); *Russell v. Chittenden*, 123 Mich. 546 (82 N. W. Rep. 204). Amendment of petition. *In re Auditor General*, 120 Mich. 704 (79 N. W. Rep. 910).

**Sec. 844. Statute of limitations and tax titles.** In Arkansas two years continuous adverse possession of land under an invalid tax deed gives the holder title unless the right to redeem existed, *McConnell v. Swepston*, 66 Ark. 141 (49 S. W. Rep. 566); but a claimant under a void tax deed can acquire title by adverse possession as against the holder of the legal title, under *Mansf. Ark. Dig.*, § 4475, only by actual adverse possession for two years, *Woolfolk v. Buckner*, 67 Ark. 411 (55 S. W. Rep. 168). In Iowa it is held that the statute of limitations begins to run against a purchaser at a tax sale from the time he is entitled to a deed, where the premises are occupied by the original owner. *Gallaher v. Head*, 108 Ia. 588 (79 N. W. Rep. 387). *Ia. Code 1873*, § 902, requiring an action to recover real estate sold for taxes to be brought within five years after the treasurer's deed is executed and recorded, does not bar an action to redeem from a tax sale not



brought within that period, where it is shown to be void. *Hintrager v. McElhinny*, Ia. (82 N. W. Rep. 1008). Where one's right of action for the recovery of premises under a tax title is not barred by the statute of limitations, an action to recover taxes paid on account of such title, in case of its failure, is not barred. *Zimmerman v. Chicago G. W. Ry. Co.*, 156 Mo. 561 (57 S. W. Rep. 718). Where there are jurisdictional defects in a tax proceeding, the recording of a tax deed issued pursuant to a sale for such tax will not set the statute of limitations running in favor of the party claiming under such deed, and it is immaterial whether such facts appear on the face of the deed or aliunde. *Roberts v. First Nat. Bank*, 8 N. Dak. 474 (79 N. W. Rep. 1049).

**Sec. 845. Construction of miscellaneous statutes.**

*Mansf. Ark. Dig.*, § 578 construed and applied—notice of confirmation of tax sale—proof of publication. *Porter v. Dooley*, 66 Ark. 1 (49 S. W. Rep. 1083). *Mansf. Ark. Dig.*, § 5760 construed and applied—time for filing delinquent list. *Boles v. McNeil*, 66 Ark. 422 (51 S. W. Rep. 71). *Conn. Gen. Stat.*, § 3836 construed and applied—assessment of corporate stock—deduction of capital invested in real estate. *In re Dennis*, 72 Conn. 369 (44 Atl. Rep. 545); *In re Batterson*, 72 Conn. 374 (44 Atl. Rep. 546). Land, the title to which a vendor has reserved until the payment of the purchase price by his vendee under a contract of purchase, and enforceable demands which he holds against such vendee for the payment of the purchase price both properly may be taxed to the vendor. *Ill. Rev. Stat.* 1899, pp. 1393, 1394. *Griffin v. People*, 184 Ill. 275 (56 N. E. Rep. 397). Ia. Code 1897, § 1333, and *Minn. Spec. Laws* 1873, ch. 111, providing for the payment of a gross-earnings tax by certain corporations in lieu of all other taxation on their property, are held unconstitutional, *Hawkeye Ins. Co. v. French*, 109 Ia. 585 (80 N. W. Rep. 660); *St. Louis Co. v. Duluth & I. R. R. Co.*, *Minn.* (80 N. W. Rep. 626). *Ky. Stat.*, § 4039 construed and applied—requiring nonresident owner of lands to file descriptive list thereof for taxation. *Commonwealth v. Engle*, *Ky.* (52 S. W. Rep. 811; 21 *Ky. Law Rep.* 1019). *La. Const.* 1898, art. 186 will not be given an

retroactive operation. Succession of Parham, 51 La. Ann. 980 (25 So. Rep. 947; State v. City of New Orleans, 51 La. Ann. 912 (25 So. Rep. 951). Mich. Laws 1889, No. 195; Laws 1891, No. 200; Laws 1893, No. 206, § 124, construed and applied—offer for sale of lands returned delinquent, by auditor general. Hoffman v. Pack, 123 Mich. 74 (81 N. W. Rep. 934); Dumphey v. Auditor General, 123 Mich. 354 (82 N. W. Rep. 55). Mich. Laws 1893, No. 206, § 42 construed and applied—sale for nonpayment of taxes—warrant of township treasurer. Conley v. McMillan, 120 Mich. 694 (79 N. W. Rep. 909). Mich. Laws 1893, No. 206, § 66 construed and applied—hearing of auditor general's petition for tax sale. Youngs v. Clark, 120 Mich. 528 (79 N. W. Rep. 803). Mich. Laws 1893, No. 206, § 70 construed and applied. Wilkin v. Keith, 121 Mich. 66 (79 N. W. Rep. 887); Conley v. McMillan, 120 Mich. 694 (79 N. W. Rep. 909). Mich. Laws 1893, No. 206, § 84 construed and applied—purchase of state tax land—deed in pursuance thereof. Cockburn v. Dix, 120 Mich. 643 (79 N. W. Rep. 931). See further on this subject, Hubbard v. Auditor General, 120 Mich. 505 (79 N. W. Rep. 979). An applicant to purchase state tax lands who pays subsequent taxes thereon has the right to make such purchase, as against a prior applicant who fails to make such payments. Moore v. Auditor General, 122 Mich. 599 (81 N. W. Rep. 561). For particular application to purchase state tax lands, held sufficient, see Hall v. Mann, 122 Mich. 13 (80 N. W. Rep. 789). Mich. Laws 1897, No. 229 construed and applied—notice by tax purchasers to occupants or persons having title, of the sale of the land. Citizens' Sav. Bank v. Auditor General, 123 Mich. 511 (82 N. W. Rep. 214). Minn. Gen. Stat. 1894, § 1600 construed and applied—assessment and enforcement of subsequent taxes on lands bid in by the state. State v. Camp, 79 Minn. 343 (82 N. W. Rep. 645). As to the sale of lands bid in by the state of Minnesota for subsequent taxes, see Countryman v. Wasson, 78 Minn. 244 (80 N. W. Rep. 973). Minn. Spec. Laws 1873, ch. 111 construed and applied—payment by railroad of gross earnings tax in lieu of other taxation—constitutionality. St. Louis Co. v. Duluth & I. R. R. Co., Minn. (80 N. W. Rep. 626). For a similar decision in Iowa, see

*Hawkeye Ins. Co. v. French*, 109 Ia. 585 (80 N. W. Rep. 660). Minn Spec. Laws 1889, ch. 32, § 50 construed and applied—sale of real property in city of St. Paul for non-payment of assessments for local improvements—setting aside. *London & Northwest Amer. Mortg. Co. v. Gibson*, 77 Minn. 394 (80 N. W. Rep. 205). For construction of the charter of St. Paul, Minnesota, in regard to the sale of lands for special assessments of taxes for improvements, notice of redemption and issuance of deed, see *Merchant's Realty Co. v. City of St. Paul*, 77 Minn. 343 (79 N. W. Rep. 1040). N. H. Laws 1889, ch. 208, § 1 construed and applied—division of school district into different sections for taxation purposes. *Allen v. Bidwell*, 68 N. H. 245 (44 Atl. Rep. 295). N. J. Laws 1884, p. 142; 1888, p. 269 construed and applied—assessment of railroad property. In *re Erie R. Co.*, 64 N. J. L. 123 (44 Atl. Rep. 976). N. Y. Laws 1885, ch. 448; Laws 1891, ch. 217; Laws 1893, ch. 711 construed and applied—conclusiveness of comptroller's tax deed—sale of wild, vacant and forest land—limitations. *Meigs v. Roberts*, 162 N. Y. 371 (56 N. E. Rep. 838; 76 Am. St. Rep. 322). Construing and applying N. Dak. Comp. Laws, §§ 1630, 1632, 1638, it is held that land purchased by a county at a tax sale are subject to sale for subsequent taxes, and a tax deed issued under such subsequent sale cuts off the rights of the county under the prior sale. *Emmons v. Bennett*, 9 N. Dak. 131 (81 N. W. Rep. 22). N. Dak. Laws 1897, ch. 67 construed and applied—right of sheriff to fee for making sale. *Wilson v. Cass County*, 8 N. Dak. 456 (79 N. W. Rep. 985). N. Dak. Laws 1897, ch. 126 construed and applied—enforcement of payment of taxes becoming delinquent prior to 1895—rights of state purchasing lands which never had been redeemed. *McHenry v. Kidder Co.*, 8 N. Dak. 413 (79 N. W. Rep. 875). A statute (Ohio Rev. Stat., § 167) giving the auditor of state power to remit taxes does not authorize him to reduce the valuation of real estate made in pursuance of law by a local board of equalization merely because he believes the valuation to be excessive. *Black v. Hagerty*, 60 O. St. 551 (54 N. E. Rep. 527). For construction of Ohio statutes in reference to entering municipal assessments on tax duplicates, and the collection

thereof, see *Makley v. Whitmore*, 61 O. St. 587 (56 N. E. Rep. 461). Va. Code, §§ 661, 666 construed and applied—sale of land purchased by the state. *Virginia Coal Co. v. Thomas*, 97 Va. 527 (34 S. E. Rep. 486).

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## TENANTS IN COMMON

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### EPITOME OF CASES.

**Sec. 846. Creation and conveyance of estate in common.** Unity of possession, or promiscuous occupation, or the right to it, is an essential to a tenancy in common. *Chamberlin v. Gleason*, 163 N. Y. 214 (57 N. E. Rep. 487). A contract by a tenant in common for the sale of the property, executed in her own name, and also in the name of her cotenant, but without the latter's authority, may be enforced specifically as to her interest on payment of her share of the price, after repudiation by her cotenant. *Keator v. Brown*, 57 N. J. Eq. 600 (42 Atl. Rep. 278). A lessee who has enjoyed the benefit of a lease taken by him from one tenant in common cannot avoid the contract because the other cotenants did not consent thereto. *Colorado Fuel & Iron Co. v. Pryor*, 25 Colo. 540 (57 Pac. Rep. 51).

**Sec. 847. Trust relation—Buying in titles and discharging incumbrances—Contribution.** A widow of a tenant in common, by reason of her right of dower in the land, has such a joint interest with the other cotenants as forbids her acquiring adverse title. *Enyard v. Enyard*, 190 Pa. St. 114 (42 Atl. Rep. 526; 70 Am. St. Rep. 623). A purchase by a cotenant of the common property at a tax sale thereof inures to the benefit of all the cotenants. *Parker v. Brast*, 45 W. Va. 399 (32 S. E. Rep. 269). The right of a tenant in common to claim the benefit of the purchase of an outstanding title to the common estate

by his cotenants is dependent upon his electing to claim such benefit and contributing to the expense incurred in the purchase of such title and on account of its ownership within a reasonable time; and if he delay unreasonably until there is a change in the condition of the property or in the circumstances of the parties, he will be held to have abandoned all benefit arising from the new transaction. *Morris v. Roseberry*, 46 W. Va. 24 (32 S. E. Rep. 1019). Tenants in common who have not made any offer to contribute to a cotenant who has purchased the property at a foreclosure sale cannot have a partition sale thereof in order that they may share in any surplus above the amount paid on the mortgage sale. *Reed v. Reed*, 122 Mich. 77 (80 N. W. Rep. 996; 80 Am. St. Rep. 541). Where tenants in common purchase land and execute their joint note for the purchase price and the grantor reserved a lien upon the land sold to secure the note, such tenants in common, while jointly bound to the vendor for the whole debt, are as between themselves, each equitably bound to discharge one-half of the same; and if either voluntarily or under compulsion of law pays more than his one-half thereof he is entitled to maintain a suit for contribution against his cotenant, and can enforce his right to contribution as against his cotenant's interest in the land. But the equities of cotenants in such a case cannot be adjusted in an action to foreclose the vendor's lien unless they are presented by proper pleadings. *Walker v. Sarven*, 41 Fla. 210 (25 So. Rep. 885).

**Sec. 848. Ouster—Action for possession—Liability for rent—Accounting.** A conveyance or incumbrance of a common estate by one cotenant does not amount to an ouster until the right to hold adversely is asserted under it. *Justice v. Lawson*, 46 W. Va. 163 (33 S. E. Rep. 102). In Missouri it is held that each tenant in common who is ousted of possession by a stranger, must sue for and recover his aliquot part or share of the estate, which part or moiety so recovered he holds in common with his disseizor until his remaining cotenants institute like proceedings as himself to oust the stranger from the possession of his or their undivided interest in the premises. *Baber v. Henderson*, 156 Mo. 566 (57 S. W. Rep. 719);

79 Am. St. Rep. 540). An agreement between two tenants in common that each shall undertake to collect his half of the rents does not relieve one from accounting to the other for half of the excess collected by him, under N. Y. Code. Civ. Proc., § 1666. Judgment in favor of a tenant in common against the estate of his cotenant for his share of the rents from certain property collected by the latter does not bar a subsequent recovery of rents from other property held by them in common, where the party recovering the judgment did not know of the latter claim at the time. *Gedney v. Gedney*, 160 N. Y. 471 (55 N. E. Rep. 1). One taking from a tenant in common owning an undivided one-third interest in a mine a lease of such interest may recover damages from the cotenant who excludes him from the privilege of working any part of the mine, and the damages recovered for such wrongful exclusion may include loss of profits that he would have made but for such exclusion. *Paul v. Cragnas*, Nev. (59 Pac. Rep. 857; 47 L. R. A. 540). Mont. Code Civ. Proc. 1895, § 592, and Laws 1899, p. 134, amending same, construed and applied—rights of cotenants of mining property not joining in its operation—accounting—injunction. *Butte & B. Consol. Min. Co. v. Montana Ore-Purchasing Co.*, 24 Mont. 125 (60 Pac. Rep. 1039).

**Sec. 849. Miscellaneous notes.** One of several tenants in common cannot cut and sell logs from the land without the consent of his cotenants, so as to divest them of their interest therein. *Nevels v. Kentucky Lumber Co.*, Ky. (56 S. W. Rep. 969; 49 L. R. A. 416). Attorneys employed by some of several cotenants to render services concerning the common estate must look to their employers for their compensation, regardless of the fact that the services inure to the benefit of all, and of the right of the employers to have contribution from their cotenants. *Mayfield v. McKnight*, Tenn. (56 S. W. Rep. 42).

# TITLE

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## EPITOME OF CASES.

**Sec. 850. Good and marketable title—Rights of vendee.** A title depending upon a will which has become conclusive, under Pa. Laws 1895, p. 305, by lapse of time, is a marketable title. *Stobert v. Smith*, 189 Pa. St. 240 (42 Atl. Rep. 134). A vendee in a contract for a sale of land by executors is entitled to a marketable title, and they cannot have specific performance of the contract where their authority to make the sale at the time it was made is doubtful. *Appeal of Clouse*, 192 Pa. St. 108 (43 Atl. Rep. 413). A vendee for value, purchasing a good title, cannot be compelled to accept a litigious or clouded title, if there is reasonable ground to apprehend litigation with regard thereto, although the same may be satisfactory to a lawyer or speculator. *Spencer v. Sandusky*, 46 W. Va. 582 (33 S. E. Rep. 221). A vendee cannot be compelled to take a title which he can maintain only by a suit in equity, even though such suit must be successful. *Van Zandt v. Garretson*, 21 R. I. 418 (44 Atl. Rep. 221). A title based on adverse possession is not marketable so as to satisfy a vendor's contract to convey a fee simple, where he fails to negative the possibility of an outstanding claim to the land or some interest in it by persons who might claim under a prior devise. *Simis v. McElroy*, 160 N. Y. 156 (54 N. E. Rep. 674; 73 Am. St. Rep. 673). In regard to the vendee's right to title, the supreme court of Arkansas, in the case of *Tupy v. Kocourek*, 66 Ark. 433 (51 S. W. Rep. 69), say: "Where there is no stipulation to the contrary, the law will presume, in a contract for the sale of lands upon a valuable consideration, that the vendor intended to convey a good title, and the vendee will not be compelled to pay his money and accept it unless it is good. *Irving v. Campbell*, 121 N. Y. 353 (24 N. E. Rep. 821; 8 L. R. A. 620); *Bisp. Eq.*, § 378; 28 Am. & Eng. Enc. Law, p. 70; 22 Am. & Eng. Enc. Law, p. 948. One

who contracts and pays his money for a title to land ought to get not only a title that he can hold against all adverse comers, but one that he can hold without reasonable apprehension of its being assailed, and one that he can readily transfer, if he desires, in the market. *Irving v. Campbell*, 121 N. Y. 353 (24 N. E. Rep. 821; 8 L. R. A. 620); *Sheehy v. Miles*, 93 Cal. 288 (28 Pac. Rep. 1046); *Street v. French*, 147 Ill. 342 (35 N. E. Rep. 814); 22 Am. & Eng. Enc. Law, p. 948, note; *Griffith v. Maxfield*, 63 Ark. 548 (39 S. W. Rep. 852), and authorities cited. In common parlance, a warranty deed means a perfect title; and, in legal contemplation, when parties contract for warranty deed they must be understood to mean a title paramount to all others." For particular title held to be marketable, see *Rutherford Land & Imp. Co. v. Sanntrock*, N. J. Eq. (44 Atl. Rep. 938). For particular case in which the right of a vendor to specific performance was denied on account of the doubtful character of his title, see *Martin v. Hamlin*, 176 Mass. 180 (57 N. E. Rep. 381).

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## TREES

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### EPITOME OF CASES.

**Sec. 851. Standing trees as personalty—Parol contracts concerning.** Standing trees, marked and designated and sold in contemplation of immediate severance from the land are personal property. *Tilford v. Dotson*, Ky. (51 S. W. Rep. 583; 21 Ky. Law Rep. 333). In Pennsylvania it is held that a sale of standing timber with a view to immediate severance may be made by parol. *Robbins v. Farwell*, 193 Pa. St. 37 (44 Atl. Rep. 260). A parol sale of timber void under the statute of frauds confers a license on the vendee to enter and cut the timber, which is not assignable and is revoked if the licensor deed the land to another or if either party die. *Bruley v. Garvin*, 105 Wis. 625 (81 N. W. Rep. 1038; 48 L. R. A. 839).



# TRESPASS

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## EPITOME OF CASES.

**Sec. 852. What constitutes trespass.** A vendee of wood, does not, by paying therefor with knowledge that his vendor had delivered it upon the land of another, make himself liable for the vendor's trespass in so doing. *Brown Peaslee*, 69 N. H. 458 (43 Atl. Rep. 591). An owner of stock wilfully herding them on the unenclosed lands of another is liable for damages done thereby, notwithstanding a statute (Mont. Pol. Code, § 3258) permits a landowner to recover damages resulting from stock running at large breaking into his inclosure, only when the premises are fenced. *Monroe v. Cannon*, 24 Mont. 316 (61 Pac. Rep. 863). See opinion for exhaustive collation and review of authorities on this subject. A landowner blasting out trees on his own land is liable as a trespasser for an injury to a traveler rightfully in an adjacent highway, occasioned by the falling of a piece of wood, though the blast was fired without negligence or want of skill. *Sullivan v. Dunham*, 161 N. Y. 290 (55 N. E. Rep. 923; 47 L. R. A. 715; 76 Am. St. Rep. 274). Construing Cal. Civ. Code, § 465, providing that railroad corporation may enter upon land to make surveys to determine the most advantageous route for its road, the supreme court of that state, in the case of *Robinson v. Southern Cal. Ry. Co.*, 129 Cal. 8 (61 Pac. Rep. 947), say: "It is a mistaken construction of the statute to suppose that a railroad corporation can enter upon land and construct its road, under sanction of law, before commencing condemnation proceedings. When it does so it becomes a trespasser, as would a natural person under like circumstances, and the ordinary common-law remedies are open to the owner, *Hull v. Railroad Co.*, 21 Neb. 371 (32 N. W. Rep. 162); *Ewing v. City of St. Louis*, 5 Wall. 413 (18 L. Ed. 657). It has been held that the owner may enjoin the entry—*Railroad Co. v. Menk*, 4 Neb. 21; *Cameron v. Supervisors*,

47 Miss. 264; *City of Paris v. Mason*, 37 Tex. 447; *Pierpoint v. Town of Harrisville*, 9 W. Va. 215;—also, that he may bring ejectment—*Railroad Co. v. Smith*, 78 Ill. 96; *Smith v. Railroad Co.*, 67 Ill. 191; *Bothe v. Railroad Co.*, 37 O. St. 147;—and in *Potter v. Ames*, 43 Cal. 75, plaintiff recovered for damages *quare clausum fregit*, where the county proceeded illegally in taking possession of land for a highway.”

**Sec. 853. Criminal trespass.** Construing and applying Fla. Rev. Stat., § 2516, making trespasses “wilfully” committed criminally punishable, the supreme court of that state, in the case of *Preston v. State*, 41 Fla. 627 (26 So. Rep. 736), say: “This essential ‘wilfulness,’ in the sense in which the word is used in the statute, cannot exist when the acts comprising the alleged trespass are committed by and with the consent, or under the authority, of the owner of the land alleged to have been trespassed upon. *State v. Preston*, 34 Wis. 675; *State v. Gardner*, 2 Mo. 22; *Commonwealth v. Kneeland*, 20 Pick. 206; *State v. Clark*, 29 N. J. Law, 96; *Boykin v. State*, 40 Fla. 484 (24 So. Rep. 141).” Where, in a criminal prosecution for the removal of a division fence, the state has shown actual possession in the prosecutor, the defendant cannot exculpate himself by showing title to the land upon which the fence was situated. *State v. Fender*, 125 N. C. 649 (34 S. E. Rep. 448). Ala. Code 1896, § 5606 construed and applied—criminal prosecution for trespass after warning. *Withers v. State*, 120 Ala. 394 (25 So. Rep. 568). Revised Ordinances of St. Louis, Ord. No. 17188, §§ 981, 1062 construed and applied—as to what acts will authorize a prosecution for trespass. *City of St. Louis v. Babcock*, 156 Mo. 148 (56 S. W. Rep. 732); *City of St. Louis v. Babcock*, 156 Mo. 154 (56 S. W. Rep. 731).

**Sec. 854. Who may maintain an action for trespass—Title or interest necessary.** A right to bring an action of trespass for damage to realty does not “run with the land,” nor is such a right assignable by a landowner to his successor in title. *Allen v. Macon, D. & S. R. Co.*, 107 Ga. 838 (33 S. E. Rep. 696). A trespass on property in possession of a servant is a trespass against the master who

may maintain an action therefor. *Maddox v. State*, 122 Ala. 110 (26 So. Rep. 305). Where a will directs the executor to sell and convey land and distribute the proceeds as provided by the will, he may maintain an action for trespass affecting the land. *Duff's Ex'r v. Duff*, Ky.

(54 S. W. Rep. 711; 21 Ky. Law Rep. 1211). One having a parol license to maintain a drain from his land across that of an adjoining owner, may maintain an action for damages against a third person who destroys or injures the drain. *Miller v. Greenwich Tp.*, 62 N. J. L. 771 (42 Atl. Rep. 735). A vendee of land cannot maintain an action for trespass to recover for the conversion of the rent of the land, against a tenant of his vendor continuing in possession after sale of the property to him with his knowledge and upon whom he has made no demand for possession or for rent. *Ingram v. Thomas*, 24 Ind. App. 570 (57 N. E. Rep. 263). Construing and applying Vt. Stat., § 5020, providing that "if a person cuts down, destroys, or carries away trees placed or growing for use, shade or ornament, or timber, wood or underwood, standing, lying or growing on the land of another person, without leave from the owner of such lands," "the party injured" may recover of such person treble damages, it is held that the owner of the land, and not a mere possessor, can recover the damages. *Davenport v. Newton*, 71 Vt. 11 (42 Atl. Rep. 1087). Proof of ownership is sufficient to maintain the action if, at the time of the injuries complained of, the land was not in the actual, exclusive occupancy of another. *Merwin v. Morris*, 71 Conn. 555 (42 Atl. Rep. 855). Possession is sufficient title to maintain the action against a stranger entering without right. *Davenport v. Newton*, 71 Vt. 11 (42 Atl. Rep. 1087). One in possession of land which he has entered under the homestead laws of the United States and obtained a receipt from the receiver of the land office may maintain an action of trespass. *Gulf, C. & S. F. Ry. Co. v. Clark*, 2 Ind. Ter. 319 (51 S. W. Rep. 962). One may maintain trespass for injury to his possession, only when he is in the actual possession and so alleges, or where he is the owner of the fee, and further shows by his petition that the land is unoccupied, and the plaintiff has the constructive possession thereof. He may also maintain an action

in the nature of trespass on the case where he alleges that he owns the legal title, and further sets out such a state of facts as will show that the injury is an injury to the real estate. *Casey v. Mason*, 8 Okla. 665 (59 Pac. Rep. 252). See opinion for review of authorities. In Kentucky it is held that where one has been in possession of land without title, claiming and using it as his own to a well defined and marked boundary continually for fifteen years, before the commission of a trespass within his boundary, he may maintain an action therefor, whether the trespass was committed outside or within his inclosure. *Shields v. Heard*, Ky. (53 S. W. Rep. 820; 21 Ky. Law Rep. 992). Particular possession by a former tenant held insufficient to maintain the action. *Donaldson v. Crane*, 120 Mich. 369 (79 N. W. Rep. 569). For note on "Sufficiency of equitable title to sustain action for trespass to land" see 47 L. R. A. 637-639.

**Sec. 855 Practice in actions for trespass—Miscellaneous notes.** One partner may maintain an action for trespass on the partnership property, and an objection to the nonjoinder of his copartners can be taken only by plea in abatement or by way of apportionment of the damages on the trial. *Carlisle v. McAlester*, Ind. Ter. (53 S. W. Rep. 531). A complaint to enjoin a trespass which alleges a prior purchase of the property by the plaintiff from the then owner and that he since has owned and occupied it, contains a sufficient averment of title to enable the plaintiff to maintain the action. *Peoria & E. Ry. Co. v. Attica, C. & S. Ry. Co.*, 154 Ind. 218 (56 N. E. Rep. 210). Particular complaint held sufficient. *Joseph Dessert Lumber Co. v. Wadleigh*, 103 Wis. 318 (79 N. W. Rep. 237). Particular complaints held insufficient. *Casey v. Mason*, 8 Okla. 665 (59 Pac. Rep. 252); *Fry v. Hubner*, 35 Or. 184 (57 Pac. Rep. 420). In order for a judgment in an action for trespass to be conclusive as to the question of title, it clearly must appear that the question was in issue and passed upon. *Kimball v. Hilton*, 92 Me. 214 (42 Atl. Rep. 394). A judgment introduced by the plaintiff between the parties which sustains his title, cannot be collaterally attacked by the defendant on the ground that it was erroneously rendered through accident or mistake. Tooth-

aker v. Greer, 92 Me. 546 (43 Atl. Rep. 498). Where, in an action of trespass, the court instructs the jury that if they believe from the evidence that "the entry was malicious or in wanton disregard of her rights," they might, in their discretion, award the plaintiff punitive damages, a subsequent definition of "malicious" which omits the element of the "intentional" doing the wrongful act, is erroneous. Ohio Valley Tel. Co. v. Meyer, Ky. (56 S. W. Rep. 673). A town seeking to maintain trespass on alleged public grounds may introduce in evidence its charter showing a grant to it of the premises. Town of Newcastle v. Haywood, 68 N. H. 179 (44 Atl. Rep. 132). A bond for title executed to a plaintiff in an action for trespass appearing on its face to be signed by an attorney in fact is not admissible to prove title in the plaintiff, where there is no evidence showing the alleged attorney's authority in the premises. Southern Ry. Co. v. Ethridge, 108 Ga. 121 (33 S. E. Rep. 850). For case determining particular questions as to admissibility of evidence, see Guentherodt v. Ross, 121 Mich. 47 (79 N. W. Rep. 920).

**Sec. 856. Defenses to action for trespass.** A trespass cannot be justified or continued upon the ground that it is beneficial to the person whose property is trespassed upon. Sharpe v. Levert, 51 La. Ann. 1249 (26 So. Rep. 100). The fact that a person contemplates having certain land condemned for a public use, or that such land is necessary for such use, does not justify his committing acts thereon which otherwise would amount to a trespass. Peterson v. Bean, 22 Utah 43 (61 Pac. Rep. 213); Robinson v. Southern Cal. Ry. Co., 129 Cal. 8 (61 Pac. Rep. 947). In an action for trespass on grounds used for many years as a public landing, the introduction by the defendant of a recorded deed to him for the premises does not constitute a defense without proof of possession of his grantor. Town of Newcastle v. Haywood, 68 N. H. 179 (44 Atl. Rep. 132). A defendant who pleads license to an action for trespass on lands lying along the boundary line between him and the plaintiff, thereby admits possession in the plaintiff and that he did the act complained of, and simply puts in issue whether it was done with the plaintiff's consent. Ragain v. Stout, 182 Ill. 645 (55 N. E. Rep. 529).

**Sec. 857. Measure of damages.** In an action for trespass by the owner of the reversion for injury to lands in the possession of tenants who were entitled to sue for damages for injury to the possession, loss of rent is not recoverable where no claim is made therefor in the complaint and no evidence on this subject is introduced on the trial. *Healey v. Kelley*, 21 R. I. 489 (44 Atl. Rep. 804). Citing, *Dutro v. Wilson*, 4 O. St. 101; *Cooper v. Randall*, 59 Ill. 317; *Hopwood v. Schofield*, 2 Moody & R. 34; *Kimball v. McIntosh*, 134 Mass. 362; 1 Sedg. Meas. Dam. (7th Ed.) 235, note; 1 Tayl. Landl. & Ten. § 173. The building of a levee on the land of another without his consent, by which it is claimed his land was made unfit for cultivation, will subject the party constructing the levee to the damages; but he will not be responsible for damages caused by the cutting of the levee by a mob, the law excluding such damages, under the rule that the party who commits the wrong cannot be held for what the law deems remote damages. Nor can attorney's fees properly be allowed to the plaintiff in such a case as a part of his damages. *Bentley v. Fischer Lumber & Mfg. Co.*, 51 La. Ann. 451 (25 So. Rep. 262).

**Sec. 858. Miscellaneous notes.** One guilty of trespass in placing a fence upon the land of another cannot recover damages for such destruction or mutilation of his fencing material by the latter as reasonably appeared necessary to prevent a repetition of the wrongful act. *Kendall v. Green*, 67 N. H. 557 (42 Atl. Rep. 178). A principal who receives and retains the benefit of an act of trespass committed by one in the presence of and with the co-operation of his agent is liable therefor. *Singer Mfg. Co. v. Stephens*, Ky. (53 S. W. Rep. 525; 21 Ky. Law Rep. 946). Va. Code 1887, §§ 2038, 2042; Laws 1893-94, p. 941; Laws 1897-98, pp. 524, 651, construed and applied—recovery of damages on account of trespassing animals. *Poindexter v. May*, 98 Va. 143 (34 S. E. Rep. 971; 47 L. R. A. 588).

# TRUSTS

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## EPITOME OF CASES.

**Sec. 859. Creation of express trusts—Necessity and sufficiency of writing.** Construing Cal. Civ. Code, § 857, limiting the creation of express trusts in real property to the purposes therein enumerated, and which does not authorize the creation of a trust in real property for the purpose of conveying it to another, it is held that a provision in a devise creating a trust directing the trustees to convey to remaindermen taking a vested interest, which is unnecessary, will not be held to be one of the "purposes" for which the testator intended the trust created by his will so as to render the trust void. *In re Fair's Estate*, 132 Cal. 523 (60 Pac. Rep. 442). A parol agreement by a grantee of an absolute conveyance to dispose of the property and return the proceeds to the grantor after the payment of his debts, creates an express trust, within Ill. Rev. Stat., ch. 59, § 9, requiring all such trusts to be manifested and proved by some writing signed by the party who has undertaken the trust. *Benson v. Dempster*, 183 Ill. 297 (55 N. E. Rep. 651). A conveyance by a grantor of all of his property to a designated person "as trustee in trust," for a certain lodge "to have and to hold unto said trustee his successors and assigns, forever," was held void as not coming within any of the four purposes enumerated in Cal. Civ. Code, § 857, for which express trusts may be created, and because the instrument did not indicate "with reasonable certainty the subject, purpose and beneficiary of the trust," as required by § 2221. *Wittfield v. Forster*, 124 Cal. 418 (57 Pac. Rep. 219). Particular memorandum held sufficient to constitute a valid declaration of a trust. *Stratton v. Edwards*, 174 Mass. 374 (54 N. E. Rep. 886).

**Sec. 860. Parol evidence to establish express trusts—Executed parol trust.** Under Sand. & H. Ark. Dig., § 3480, an express trust in lands cannot rest upon parol. *Salysers*

v. Smith, 67 Ark. 526 (55 S. W. Rep. 936). Under Miss. Code, § 4230, the grantor in a deed cannot show by parol evidence that the deed was executed to enable the grantee to manage the land for the grantor's benefit. *Horne v. Higgins*, 76 Miss. 813 (25 So. Rep. 489). Where a grantee in an absolute deed executes a parol trust, subject to which he took title, by conveying the land in accordance with the terms thereof, his conveyance will be upheld as against his creditors though executed after their claims accrued; and parol evidence is admissible to show the existence of the trust. *Richmond v. Bloch*, 36 Or. 590 (60 Pac. Rep. 385). Upon the last proposition, this case is followed and specially approved in the case of *Gottstein v. Wist*, 22 Wash. 581 (61 Pac. Rep. 715). In the former case the court say: "It is not necessary, however, that the writing declarative of the trust should have been executed contemporaneously with the instrument under which the trustee acquired and holds the property. Any subsequent acknowledgment thereof, by deed or other writing, sufficiently clear and explicit in its terms and conditions to manifest the purpose and capacity in which he holds, will fulfill the demands of the statute, and supply the requisite evidence by which to establish the trust. *Smith v. Howell*, 11 N. J. Eq. 349; *Cain v. Cox*, 23 W. Va. 594; *Price v. Brown*, 4 S. C. 144; *Gardner v. Rowe*, 2 Sim. & S. 346. In *Cain v. Cox*, 23 W. Va. 594, the declaration of trust was in the nature of a title bond executed by the grantee some six years after the conveyance to her by deed under which the trust was claimed; in *Smith v. Howell*, 11 N. J. Eq. 349, the declaration of trust was signed ten years after the making of the deed, and in *Gardner v. Rowe*, 2 Sim. & S. 346, there was a declaration after an act of bankruptcy had been committed; and in all these cases the writing was held to be sufficient and competent by which to establish the trust. The adjudicated purpose of the statute, however, is not to declare such a parol or verbal trust illegal, and therefore a nullity. But the trustee may elect to perform the conditions thereof, notwithstanding the absence of compulsory power; and the courts will, if he chooses to act upon his verbal promise, protect him in the execution of the trust, and, as far as possible, will protect the beneficiaries in the enjoyment of the fruits of its execution, and when once the trust is exe-



cuted it cannot be revoked. 1 *Perry*, Trusts (5th Ed.) §§ 76, 77; *Eaton v. Eaton*, 35 N. J. L. 290; *Karr v. Washburn*, 56 Wis. 303 (14 N. W. Rep. 189). In *Sieman v. Austin*, 33 Barb. 9, it was sought to subject the interest of an apparent owner of land to the lien of a judgment creditor after a conveyance to the real owner in execution of a trust which rested in parol. The trust was express in its nature, and the question was whether parol evidence could be received, under the circumstances, to support the deed to the cestui que trust. In deciding the case, Emott, J., said: 'The law refuses its aid to enforce agreements creating trusts or charges upon lands when they rest altogether in parol, not because the trusts are therefore void, but because it will not permit them to be proved by such evidence. But when a person who has received the title to lands purchased for the benefit of another, although without having declared the fact in writing, recognizes and fulfills the trust, it is not the duty of the court to deny its existence. \* \* \* If he fulfills the trust by conveying the property to the true owner, there is no rule of equity which will impeach the title thus acquired.'

**Sec. 861. Parol evidence to establish express trust—Degree of proof required.** To establish a trust in land arising out of a parol agreement, the proof must be clear, convincing, irrefragable, but the evidence need not be such as to convince the court beyond a reasonable doubt. *Stone v. Manning*, 103 Tenn. 232 (52 S. W. Rep. 990). In the case of *Sheehan v. Sullivan*, 126 Cal. 189 (58 Pac. Rep. 543), in which particular parol evidence is held insufficient to show that a grantee in an absolute deed held the land in trust, the supreme court of California say: "The authorities are uniform to the point that to justify a court in determining from oral testimony that a deed, which purports to convey land absolutely in fee simple, was intended to be something different, as a mortgage or trust, such testimony must be clear, convincing and conclusive,—something more than that modicum of evidence which appellate courts sometimes hold sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly expressed deed, solemnly executed and delivered. Language used by different courts in declaring how strong

such evidence must be may be seen in the notes to *Mahoney v. Bostwick*, 96 Cal. 53 (30 Pac. Rep. 1020; 31 Am. St. Rep. 180). Some of the expressions there quoted are: 'Must be clear, satisfactory, and convincing;' 'clear and satisfactory;' 'clear and convincing;' 'very satisfactory;' 'strong and convincing;' 'clear, unequivocal and convincing;' 'clear, explicit, and unequivocal;' 'so clear as to leave no substantial doubt;' 'sufficiently strong to command the unhesitating assent of every reasonable mind.' In *Becker v. Howard*, 75 Wis. 422 (44 N. W. Rep. 759), the court said: 'To convert a deed absolute into a mortgage, the evidence should be so clear as to leave no substantial doubt that the real intention of the parties was to execute a mortgage.' Similar declarations on this subject have been frequently made by this court. See *Mahoney v. Bostwick*, 96 Cal. 53 (30 Pac. Rep. 1020; 31 Am. St. Rep. 180), and cases there cited; *Sherman v. Sandell*, 106 Cal. 373 (39 Pac. Rep. 797). In most of these cases the attempt was to show by parol evidence that an absolute deed was a mortgage under a statutory provision which expressly declares that this may be done, while there is no such statutory provision as to a trust. While in many of the cases cited the court below had found against the asserted mortgage or trust, and the judgment was affirmed, still they clearly declare that the rule as above stated should govern trial courts, and that, where an absolute deed has been found to be something else, the sufficiency of the evidence to support the finding should be considered by the appellate court in the light of that rule. In *Wilson v. Parshall*, 129 N. Y. 223 (29 N. E. Rep. 297), the court say: 'The security of titles and sound public policy require that a party alleging that a deed absolute in form is, nevertheless, a mortgage, should show it by very satisfactory evidence; and, where he attempts to show it by oral evidence, his proof should amount to more than a mere guess or surmise, or even inferences which are just as consistent with one theory of the deed as the other.' *Fisher v. Witham*, 132 Pa. St. 488 (19 Atl. Rep. 276); *Coyle v. Davis*, 116 U. S. 108 (6 Sup. Ct. Rep. 314). Moreover, courts have not infrequently reversed judgments declaring such deeds to be mortgages or trusts, where there was considerable evidence supporting them. In *Cake v. Shull*, 45 N. J. Eq. 208 (16 Atl. Rep.

434), and also in *Langer v. Meserve*, 80 Ia. 158 (45 N. W. Rep. 732), a judgment deciding a deed to be a mortgage was reversed for want of sufficient evidence, and in each of those cases the evidence in support of the finding was vastly stronger than in the case at bar."

**Sec. 862. Construction of particular instruments creating trusts.** A conveyance of land in trust for the support of a wife and children and for the education of the latter, which makes no provision as to the disposition of the land after the trust is executed, leaves such interest in the grantor. *Monday v. Vance*, 92 Tex. 428 (49 S. W. Rep. 516). A conveyance by deed, of land to one as trustee for "his wife and the children, issue of their marriage," includes as beneficiaries only the wife and such of her children of the marriage with the trustee as were in life at the time of the execution and delivery of the deed, and the trust becomes executed and the legal title to the property vests in them when the youngest of such beneficiaries reaches the age of majority; and a suit cannot be maintained by the wife and all the children of the marriage, including several children who were born after the execution of the trust deed, to set aside a sale of the property, on the ground of fraud, made by the trustee after the trust had become executed; to re-establish the trust in the property; to remove the trustee on account of mismanagement, and to appoint another trustee in his place to take charge of the property in the interest of the plaintiffs as the *cestuis que trustent*. *Hollis v. Lawton*, 107 Ga. 102 (32 S. E. Rep. 846; 73 Am. St. Rep. 114). A conveyance of lands in trust for their children, free from the debts and liabilities of the husband or wife "or their control, further than the use and appropriation of the rents and profits of said lands, for the sustenance of themselves, and the support, education, and maintenance of the children aforesaid," does not place any restraint upon the right of the children to alienate their interest during the lifetime of either of the parents; and upon the death of one of the parents, the possibility of further issue thus being extinguished, the interests of the beneficiaries become vested and may be conveyed by them, and the surviving parent may waive his interest in the land by joining in their conveyance. *Honnett v. Williams*, 66

Ark. 148 (49 S. W. Rep. 495). Particular declaration of trust held to reserve to the trustor a power coupled with an interest which is not revoked by the death of those for whom he declares the trust. *Griffith v. Maxfield*, 66 Ark 513 (51 S. W. Rep. 832).

**Sec. 863. Conveyance of land in trust to pay grantor's debts.** A grantee accepting a deed, given to him in consideration of his agreement to pay his grantor's debts, becomes primarily liable for such debts, and a court of equity will treat the transaction as a trust and subject the property to the payment of such debts in the hands of the grantee, his representatives or one to whom he has voluntarily conveyed it. *Moore v. Triplett*, 96 Va. 603 (32 S. E. Rep. 50; 70 Am. St. Rep. 882). One who has conveyed his property to a trustee to convert it into money and pay the grantor's debts cannot maintain an action for damages against the trustee for a fraudulent disposition of the property in violation of the trust without first bringing a suit in equity for an accounting and closing of the trust. *Nordine v. Wright*, 37 Or. 411 (61 Pac. Rep. 734).

**Sec. 864. Statute of uses and passive trusts.** The statute of uses has no application to personal property. *Ure v. Ure*, 185 Ill. 216 (56 N. E. Rep. 1087). The statute of uses (27 Hen. VIII) is in force in Georgia and is held to apply to a conveyance of land by a grantor to one to hold in trust for a third person, which places no limitation on the extent of the beneficiary's interest in the property and imposes no duty upon the trustee except to hold the property for the benefit of the beneficiary as against the debts and liabilities of the latter. *Terrell v. Huff*, 108 Ga. 655 (34 S. E. Rep. 345). Under N. Dak. Rev. Codes, §§ 3380-3383, a conveyance to one as trustee which does not require or authorize him as such trustee or otherwise to do any act or perform any duty or exercise any power with respect to the land conveyed or with respect to the title thereto operates to convey the whole estate, both legal and equitable, to the cestuis que trustent. *Smith v. Security, L. & T. Co.*, 8 N. Dak. 451 (79 N. W. Rep. 981). When lands are conveyed to the grantees as trustees, "and to their assigns," but without naming the

beneficiaries or expressing the terms of the trust, the title is not merely a nominal one, or void as to the trustees, but a power of disposition of the trust estate vests in the grantees, and the conveyance cannot be deemed a direct one to the beneficiaries, under Kan. Gen. Stat. 1897, ch. 113, § 13, providing that "a conveyance or devise of lands to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary." *Boyer v. Sims*, 61 Kan. 593 (60 Pac. Rep. 309). A provision in a devise of real and personal property that a person named as executor in the will shall hold and control the property in trust for a designated devisee who is "to have the income, only, from said estate to his own use and benefit as long as he may live, and on his death said estate to revert to his natural heirs," does not create a passive trust which vests the legal title in the cestui que trust, under the statute of uses. *Ure v. Ure*, 185 Ill. 216 (56 N. E. Rep. 1087). An active trust and not a naked power only is created by a will directing a trustee to transfer parts of the testator's estate to beneficiaries on the happening of certain contingencies, and which requires him in the meantime to keep the lands rented and the personal property loaned at the highest legal rate of interest, pay taxes and assessments, repair and rebuild buildings and keep the same insured, and apply the balance of the proceeds equally in the "necessary care, maintenance, and education of those entitled to the actual benefit of the respective trusts under the terms and provisions of the will." *Eldred v. Meek*, 183 Ill. 26 (55 N. E. Rep. 536; 75 Am. St. Rep. 86).

**Sec. 865. Power of courts in respect to trusts.** A court of equity, on the petition of a creditor of the cestui que trust, may direct the application of the income from the trust estate to the payment of a debt due such creditor, where, by the terms of the contract, the trustees are to apply the income from the trust estate "for the use of" the cestui que trust. *Huntington v. Jones*, 72 Conn. 45 (43 Atl. Rep. 564). *Purd. Pa. Dig.*, p. 2036, pl. 68 construed and applied—removal of trustee on petition of cestui que trust

having a life estate. *In re Nathan's Estate*, 191 Pa. St., 404 (43 Atl. Rep. 313).

**Sec. 866. Title, rights, powers and liabilities of trustees.** The estate of a trustee in the real estate which is the subject-matter of the trust is commensurate with the powers conferred by the trust, and the purposes to be effected by it. The trustee acquires whatever estate, even to a fee simple, is needed to enable him to accomplish the purposes of the trust. *Lawrence v. Lawrence*, 181 Ill. 248 (54 N. E. Rep. 918). Whenever an instrument creating a trust confers upon the trustee any power in trust, or imposes any duty relating to the control or management of the trust estate, or establishes any agency to be performed by the trustee as such, the legal title vests in him in order to enable him to administer the trust; and where a decedent in his lifetime, created in a trustee such a trust, proceeds of a sale by the trustee in carrying out such trust form no part of such decedent's estate, and his administrator has no right whatever thereto. *Barrette v. Dooly*, 21 Utah, 81 (59 Pac. Rep. 718). The first proposition contained in the foregoing statement is supported by *Walton v. Drumtra*, 152 Mo. 489 (54 S. W. Rep. 233); *Schiffman v. Schmidt*, 154 Mo. 204 (55 S. W. Rep. 451). Trustees, by their resignation, cannot divest themselves of the legal title to property vested in them by the instrument creating the trust. *Simpson v. Erisner*, 155 Mo. 157 (55 S. W. Rep. 1029). Upon the death of a trustee holding the legal title to land, such title vests in his heirs subject to the trust, and they are necessary parties to any proceeding instituted for the purpose of divesting them of such title. *Lawrence v. Lawrence*, 181 Ill. 248 (54 N. E. Rep. 918). A trustee in an express trust who was restrained with respect to matters concerning real estate to which he held the legal title and which formed a part of the trust estate, may maintain an action on the bond given in an injunction suit in which he is named as the obligee. *Gyger v. Courtney*, 59 Neb. 555 (81 N. W. Rep. 437). A trustee who fails to observe his trust is liable to the beneficiary for the loss occasioned him by such failure and his expenses incurred in enforcing the trust; and this liability may be enforced against the trust-

tee's heirs. *Miller v. Miller*, 148 Mo. 113 (49 S. W. Rep. 852).

**Sec. 867. Sale and conveyance by trustee.** Upon the death of one of three trustees to whom property has been deeded the survivors may execute a valid conveyance. *McCallister v. Ross*, 155 Mo. 87 (55 S. W. Rep. 1027). A conveyance of real estate made to a bank by its president in order to prevent a panic "for the purpose of securing all of the depositors of the [bank] to be wholly and fully used for the purpose of paying all of the debts of the said" bank, makes the bank a trustee with power in its discretion to sell or mortgage the land in whole or in part. *Steinke v. Yetzer*, 108 Ia. 512 (79 N. W. Rep. 286). Where members of a firm convey partnership property to a surety on their obligation to be held in trust by him and sold to the highest bidder, the proceeds first to be applied to the payment of the debt for which the trustee stands as surety and the remainder to the extinguishment of other debts of the firm, a subsequent conveyance of the property made by the trustee to one of the members of the firm for an amount sufficient to satisfy his debt, which was much less than the real value of the property, will be set aside as fraudulent. *Jones v. Steelman*, 22 Wash. 636 (61 Pac. Rep. 764). Ky. Stat., § 4846 construed and applied—duty of purchaser to see to the application of the purchase money. *Owsley v. Eads' Trustee*, Ky. (57 S. W. Rep. 225).

**Sec. 868. Trustee dealing with trust estate—Purchase at his own sale.** Construing and applying Minn. Gen. Stat. 1894, § 4605, providing that "no executor, administrator or guardian making a sale shall directly or individually purchase or be interested in the purchase of any part of the real estate sold, and all sales made contrary to the provisions of this section shall be void," it is held that a sale by a mother as guardian of her infant children of their real estate to her second husband is voidable at the election of the wards. *Brown v. Fischer*, 77 Minn. 1 (79 N. W. Rep. 494). Where a trustee who had thoroughly advertised an auction sale of the trust estate without any intention of buying the property, became the purchaser thereof in good faith at a price about equal to the full value

of the property, by assuming the bid of one to whom the property had been knocked off by the auctioneer who run the bids up by fictitious bidding, his title will not be set aside on the application of the beneficiaries, where they are all of age, live near the property, accepted the proceeds of the sale and acquiesced in his improvement of the property. *Voorhees v. Bailey*, 59 N. J. Eq. 292 (44 Atl. Rep. 657). The court say: "The fundamental principle governing all dealings with property held in trust is that the cestui que trust is entitled to the best efforts of the trustee to further in all legitimate ways the interests of the cestui que trust. It is the duty of the trustee to use and exercise such care and diligence in dealing with the trust estate as a prudent, sagacious man would bestow upon his own. The trustee is not permitted to have any interest in the subject of the trust antagonistic to, or in any degree inconsistent with, that of the cestui que trust. It follows from this that, where there is a trust for sale, the trustee cannot become, either directly or indirectly, a purchaser at his own sale, even though the sale be at auction, and so conducted as to insure the best price, and in point of fact the price actually paid appear to be a fair and full one. The principal reasons for extending the restriction so far are (1) that the trustee shall not be subjected to the least temptation to abate any reasonable efforts to procure the best price for the trust property; (2) the danger that the trustee may have become possessed, in the course of his dealing as trustee, of some secret information of facts and circumstances affecting the value of the trust property, which he may take advantage of for his own benefit; and (3) the difficulty of ascertaining whether in fact all proper efforts have been made by the trustee to procure the best price. It is at once apparent that it is of the essence of this rule that the obnoxious, inconsistent position of the trustee should exist before or at the time of the sale, which period in a sale at auction, is the moment of striking off the property to the highest bidder, and declaring him the purchaser. The trustee must entertain the intention or desire to purchase before or at the moment of the sale, in order to place himself in a position antagonistic to his cestui que trust. If the trustee advertise and prepare for the sale with proper care and diligence, and in good faith,



without entertaining the least intention or expectation of becoming a purchaser, and, in case of a sale at auction, does not in fact, directly or indirectly, bid for the property, and it is struck off in good faith to another person, then there is a complete absence of any of the elements of danger to the interests of the cestui que trust which underlie the restrictive rule in question."

**Sec. 869. Revocation of trusts.** A grantor in a voluntary settlement cannot revoke his grant unless the power of revocation be reserved in the conveyance. *Monday v. Vance*, 92 Tex. 428 (49 S. W. Rep. 516). Citing, *Ewing v. Jones*, 130 Ind. 247 (29 N. E. Rep. 1057; 15 L. R. A. 75); *In re Thurston*, 154 Mass. 596 (29 N. E. Rep. 53; 26 Am. St. Rep. 278); *Hellman v. McWilliams*, 70 Cal. 449 (11 Pac. Rep. 659). The omission from a trust deed in the nature of a voluntary settlement of a reservation of the power to revoke it is not sufficient ground for cancelling such deed, where it does not appear that the grantors desired or expected such a clause to be inserted or that it was omitted through accident, mistake or fraud, *Lawrence v. Lawrence*, 181 Ill. 248 (54 N. E. Rep. 918); or where it appears that the retention of the power of revocation would have defeated one of the principal objects of the settlement, *Middleton v. Shelby Co. Trust Co.*, Ky. (51 S. W. Rep. 156; 21 Ky. Law Rep. 183). Construing and applying Cal. Civ. Code, § 2280, providing that trusts cannot be revoked after acceptance "unless the declaration of trust reserves the power of revocation to the trustor, and in that case the power must be strictly construed," it is held that where a trust deed stipulated that the grantor might modify or revoke the trust by a deed recorded in a certain city recorder's office, that the trust could not be revoked by his will. *Carpenter v. Cook*, 128 Cal. 1 (60 Pac. Rep. 475). Devisees of land who, as a matter of convenience and economy, convey the land to a trust company to sell and account for the proceeds by an instrument which declares itself irrevocable, cannot revoke the trust after the sale has been made, though the deed has not been executed. *O'Pool v. Union Bank & Trust Co.*, 102 Tenn. 29 (49 S. W. Rep. 741). One who, without reserving the power of revocation, conveys his property to trustees who are to manage it, ap-

ply the proceeds in a designated manner and convey it on the death of the grantor to persons appointed by his will, after executing his will directing the conveyance of the property to certain persons, cannot revoke the trust deed by a conveyance of a portion of the property to persons not named in the will. *Rynd v. Baker*, 193 Pa. St. 486 (44 Atl. Rep. 551).

**Sec. 870. Miscellaneous notes.** A conveyance of land to a trustee for the benefit of a married woman, which gives the trustee power to sell and convey in fee simple or to incumber it at the request of the wife, may provide that upon her death without having made any disposition of the land the trust ceases and the property vests in the husband. *Walton v. Drumtra*, 152 Mo. 489 (54 S. W. Rep. 233). The power of appointment given to the beneficiary of a trust may be exercised by the execution of a mortgage. *Manning v. Screven*, 56 S. C. 78 (34 S. E. Rep. 22). Beneficiaries of a trust cannot alienate their interests where such act would operate to destroy the trust. *Monday v. Vance*, 92 Tex. 428 (49 S. W. Rep. 516). Citing, *Perkins v. Hays*, 3 Gray, 405; *Smith v. Towers*, 69 Md. 77 (14 Atl. Rep. 497; 9 Am. St. Rep. 398); *Keyser v. Mitchell*, 67 Pa. St. 473; *Barnes v. Dow*, 59 Vt. 530 (10 Atl. Rep. 258); *Page v. Way*, 3 Beav. 20. Where, by the terms of a trust devising land to a trustee to hold the same for the benefit of an intemperate person and his family, it is provided that if such person become a temperate and prudent man and remain so for five years the title to the property shall vest in him, until such condition has been complied with the statute of limitation does not run against the cestui que trust and he has no power to contract to convey the land. *Millsaps v. Shotwell*, 76 Miss. 923 (25 So. Rep. 359).

# VENDOR AND VENDEE

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## EPITOME OF CASES.

**Sec. 871. Destruction of buildings after contract of sale.** The execution of an absolute contract for the sale of real estate, with an agreement to convey at a future date upon payment of the installments of purchase money, vests the equitable title in the vendee, who must bear the loss occasioned by the destruction of the buildings thereon by fire without the fault of the vendor after the date of the agreement and before the time for the conveyance to be executed, and he cannot refuse to comply with the contract on account of the destruction of the buildings. *Dunn v. Yakish*, 10 Okla. 388 (61 Pac. Rep. 926). Citing *Brewer v. Herbert*, 30 Md. 301 (96 Am. Dec. 582); 1 Sugd. Vend. ch. 7, § 2; *McKechnie v. Sterling*, 48 Barb. 330; 1 Pom. Eq. Jur. § 368; 2 Warv. Vend. 850; *Reed v. Lukens*, 44 Pa. St. 200 (84 Am. Dec. 425); *Lombard v. Congregation*, 64 Ill. 482; *Snyder v. Murdock*, 51 Mo. 175.

**Sec. 872. Right of vendee to recover for injuries to the land.** A vendee in possession of land under an executory contract of sale, being the equitable owner of the premises, the vendor holding the legal title merely as security for the unpaid purchase money, is entitled to recover the whole of the damages to the land resulting from a trespass thereon. *Hueston v. Mississippi & R. R. Boom Co.*, 76 Minn. 251 (79 N. W. Rep. 92). A vendee of property injured by a nuisance cannot recover damages occasioned previous to his purchase. *Hughes v. General Electric Light & Power Co.*, Ky. (54 S. W. Rep. 723; 21 Ky. Law Rep. 1202). A vendee cannot sue to recover damages for the wrongful appropriation of a portion of the land for railroad purposes, for which his vendor had an accrued right of action at the time of the sale. However, in such a case, he may recover new and additional damages growing out of the continuation of the original

trespass after he acquired title; but he does not show a new and fresh cause of action against the railroad company by alleging that, because of the exposure of his live stock to danger from the running of its trains, he has been compelled to incur expense in erecting fences for their confinement and protection. *Allen v. Macon, D. & S. R. Co.*, 107 Ga. 838 (33 S. E. Rep. 696). The court say: "It is unquestionably true that 'a railroad company is not liable, to a party who purchases land after the road is constructed across it, for any damage done to the land in the construction of the road. If the owner of the land at the time of the construction of the road does not complain of the damage done to the land, his grantee certainly cannot.' *Railway Co. v. Morgan*, 72 Ill. 155. To the same effect, see, also, *Railroad Co. v. Allen*, 39 Ill. 205; *Railway Co. v. Allen*, 100 Ind. 409; *Pomeroy v. Railroad Co.*, 25 Wis. 641; *Railroad Co. v. Strange*, 63 Wis. 178 (23 N. W. Rep. 432); *Zimmerman v. Canal Co.*, 1 Watts & S. 346; *Navigation Co. v. Decker*, 2 Watts, 343; *Turnpike Road v. Brosi*, 22 Pa. St. 32; *Tenbrooke v. Jahke*, 77 Pa. St. 392; *Allyn v. Railroad Co.*, 4 R. I. 461; *Sargent v. Machias*, 65 Me. 591; *Verdier v. Railroad Co.*, 15 S. C. 476; *Sams v. Railway Co.*, 15 S. C. 484; *Railroad Co. v. Pfeuffer*, 56 Tex. 67; *Hentz v. Railroad Co.*, 13 Barb. 646; *Haskell v. City of New Bedford*, 108 Mass. 208. The reason for this rule is obvious. As is pointed out by the authorities above cited, a trespass upon land simply gives to the owner a right of action for damages, which cannot be said to 'run with the land,' and therefore does not pass to a subsequent purchaser. In this connection, see, specially, *McFadden v. Johnson*, 72 Pa. St. 335 (13 Am. Rep. 681), wherein it appeared that the plaintiff was owner of land through which a railroad was constructed, and, before receiving compensation for the resulting damage to her property, sold the land to another, with whom the company afterward had a settlement, paying him a specified sum as damages. Upon her bringing against him an action of assumpsit, the court held 'she could recover the amount from him,' for the reason that 'the damages were a personal claim of the owner when the injury occurred. They did not run with the land, nor pass by the deed, although not reserved.' And see *Mills, Em. Dom.* (2nd Ed.) §§ 66, 67."

**Sec. 873. Right of vendor taking reconveyance of land to have action for damages to it.** A vendor who has repurchased from the vendee the land sold, paying therefor more than he received, cannot recover damages for an injury to the land while the vendee held the title, as if there had been merely a rescission of the original contract. *Bank of Hopkinsville v. Western Kentucky Asylum for the Insane*, Ky. (56 S. W. Rep. 525; 21 Ky. Law Rep. 1820). A vendor retaining a lien for the unpaid purchase money who, after the rescission of the sale, accepts a reconveyance of the land to him in consideration of the cancellation of the purchase money notes, cannot afterward maintain an action for timber removed while the vendee held a deed to the land. *Carey v. Starr*, 93 Tex. 508 (56 S. W. Rep. 324). Citing, *Berthold v. Holman*, 12 Minn. 335 (93 Am. Dec. 233); *Corbin v. Reed*, 43 Ia. 459; *Kennery v. Burgess*, 38 Mo. 440; *Hutchins v. King*, 1 Wall. 53 (17 L. Ed. 544).

**Sec. 874. As to what constitutes a contract of sale.** To constitute a valid contract for the sale of real estate, there must be a definite and unconditional offer on the one part, and an absolute acceptance on the other. In an offer to sell by letter, containing a provision that such offer depends upon the happening of some other event, the proof must show that such event has actually happened, before such offer will be final, and before the acceptance of such offer can constitute a binding contract. *McCormick v. Bonfils*, 9 Okla. 605 (60 Pac. Rep. 296). A contract of sale made by and in the name of one of several persons who are joint owners of the property agreed to be sold, and which purports on its face and by its terms to be the contract only of the individual who negotiates the sale, will not be construed as a contract on the part of such vendor as agent for the others simply because he has represented to the buyer that he has full power and authority to sell the interests of the others in the property. *Raudabaugh v. Hart*, 61 O. St. 73 (55 N. E. Rep. 214; 76 Am. St. Rep. 361).

**Sec. 875. Land contracts—Miscellaneous notes.** The parties to a contract for the sale of real estate, by proper stipulation, may provide that in case the vendee fails to

make payments according to the terms of the contract, it shall be treated as a lease and prior payments made by him forfeited and regarded as rental. *Baltes Land, Stone & Oil Co. v. Sutton*, 25 Ind. App. 695 (57 N. E. Rep. 974). The mere fact that one party to a contract for the exchange of lands conveys to the other all the land he was to convey and receives from him a deed for a part only of the land which the latter was to convey, does not establish conclusively an extinguishment of the contract. *Harland v. Harpold*, 182 Ill. 227 (55 N. E. Rep. 376). A vendor may maintain an action on his vendee's covenant to pay taxes and installments of interest without tendering a conveyance, where such covenant was independent of the conveyance or tender of conveyance by the plaintiff. *Foley v. Dwyer*, 122 Mich. 587 (81 N. W. Rep. 569). It is only when a party holding a contract of purchase, by performance on his part, has placed himself in a position to compel specific performance, that he holds the equitable title. *Smith v. Jones*, Utah, (60 Pac. Rep. 1104). A vendee may waive his right to have submitted to him for examination executed deeds, by accepting and examining unexecuted deeds prepared for that purpose according to the form to be used. *Latrobe v. Winans*, 89 Md. 636 (43 Atl. Rep. 829).

**Sec. 876. Bond for title—Subsequent conveyance by vendor who has given—Retention of title to secure purchase price.** An obligee in a bond for a deed is not entitled to have returned to him payments he has made upon cancellation of the contract on account of his default, after he has been given ample opportunity to comply with it. *Roberts v. Yaw*, Kan. (61 Pac. Rep. 409). A vendor who takes notes for the purchase price and executes to his vendee a bond for title has only the interest of a mortgagee in the premises and the vendee, in analogy to the mortgagor, is the owner of an equity of redemption and that is the real and beneficial estate, which is descendible by inheritance, devisible by will, and alienable by deed, precisely as if it were an absolute estate of inheritance at law. *Strauss v. White*, 66 Ark. 167 (51 S. W. Rep. 64). A general warranty deed, without limitation, reservation, or exception, conveys all the grantor's right, title, and interest, both legal

and equitable, in and to the property embraced therein, including the right of retention of the title to secure the unpaid purchase money due and owing from a prior recorded title-bond purchaser of an undivided interest in such property, and operates as a transfer of such unpaid purchase money to the grantee; and after due recordation of such deed, and notice thereof, such title-bond purchaser cannot pay such unpaid purchase money to his vendor, the grantor in such absolute deed, except at his own risk and peril, but must pay the same to the grantee before he can demand conveyance of the retained legal title. It is a fraud upon the grantee in such deed, after delivery and recordation thereof, for the grantor to receive payment of such unpaid purchase money; and such title-bond purchaser must take notice of the recorded condition of the legal title, and he cannot take advantage of such fraud without becoming a participant therein. *Southern Bldg. & L. Ass'n v. Page*, 46 W. Va. 302 (33 S. E. Rep. 336).

**Sec. 877. Option contracts.** A contract giving one an option to purchase the fee outright is not abrogated or surrendered by his taking a lease of the premises. *Wade v. South Penn Oil Co.*, 45 W. Va. 380 (32 S. E. Rep. 169). A contract by plaintiff to sell, and by defendants' predecessors in interest to buy, certain mining property, which contract is personal, and does not, in terms, run to heirs and assigns, and under which the prospective grantees, although given possession, could neither sell nor assign, without grantor's consent, until they had become entitled to a deed by performance of certain conditions, one of which was to pay grantor a certain sum out of the property, is a mere option to purchase, with a license to extract ore, and not a covenant running with the land. *Smith v. Jones*, Utah, (60 Pac. Rep. 1104). In order for the holder of an option contract for the purchase of real estate to claim the benefit thereof, he must show a full compliance with all of its terms within the time given by the option. *Nelson v. Stephens*, 107 Wis. 136 (82 N. W. Rep. 163). The court say: "In *Cummings v. Town of Lake Realty Co.*, 86 Wis. 382 (57 N. W. Rep. 43), it is said that rights under an option to buy land on or before a certain date expires on that date without notice or declaration of for-

teiture. In *Richardson v. Hardwick*, 106 U. S. 252 (1 Sup. Ct. Rep. 213; 27 L. Ed. 145), we find it stated that where one has, by a contract, the privilege or option of buying an interest in lands by paying a certain sum within a limited time, the contract itself does not vest him with any interest or estate in the lands, and by his failure to pay the money, or any part of it, with the time limited, the privilege accorded him by the contract is at an end, and his rights under it cease. See the following cases to the same effect: *Bostwick v. Hess*, 80 Ill. 138; *Bashor v. Cody*, 2 Ind. 582; *Steele v. Bond*, 32 Minn. 14 (18 N. W. Rep. 830); *Manufacturing Co. v. Lewis*, 45 Minn. 164 (47 N. W. Rep. 652); *McManus v. Railroad Co.*, 51 Minn. 30 (52 N. W. Rep. 980); *Lord Ranelagh v. Melton*, 10 Jur. (N. S.) 1141; *Brooke v. Garrod*, 3 Kay & J. 608.

In speaking of options to purchase, 1 Warv. Vend. p. 187, says: 'It is not a contract of sale within any definition of the term, and, at best, but gives to the option holder a right to purchase upon the terms and conditions, if any, specified in the agreement or proposal. The right, to be made available, must be exercised at or within the time specified in the agreement, and the conditions precedent, if any are annexed, must be faithfully and punctually performed. A partial performance of some of the stipulations which it is intended shall form a portion of the future contract of sale, while they may indicate an intention to make the purchase, does not confer any additional rights upon the prospective purchaser, where the conditions upon which the option and right of purchase depends have not been complied with, and the noncompliance of such conditions is a sufficient ground for a denial of any claim of right in the land under the agreement.'

**Sec. 878. Assignment of contract for the purchase of land.** One taking an assignment from a vendee of his contract to purchase real estate which by its terms passes to the assignee all the vendee's interest in the contract in and to the land therein described, with all the rights, privileges, powers and liabilities under the contract acquires the vendee's right to recover damages for the vendor's wrongful withholding of possession. *Abrahamson v. Lamberson*, 79 Minn. 135 (81 N. W. Rep.



768). One taking an assignment of a contract of purchase who does not assume to make the payments to the vendor which the original vendee stipulated to make, is not personally liable therefor; but he may become liable to the vendor for rent under a stipulation in the contract that if the vendee fail to perform he should be regarded as a tenant of his vendor. *Baltes Land, Stone & Oil Co. v. Sutton*, 25 Ind. App. 695 (57 N. E. Rep. 974). An assignee of a bond for title who has complied with the terms thereof in regard to the payment of the purchase price and received a deed from the owner does not take subject to a mortgage given by his assignor before the execution of the deed and after the assignment, although the latter was not recorded. *Cochran v. Adler*, 121 Ala. 442 (25 So. Rep. 761). A vendee is liable on his covenants in a contract for the purchase of land after it is assigned to another, where the vendor does not release him, though the assignee covenants to perform the contract and the assignment is made with the consent of the vendor. *Foley v. Dwyer*, 122 Mich. 587 (81 N. W. Rep. 569). A contract for sale of lands, though signed only by the vendor, will not be held to be unilateral, on the contention of the assignee of the vendee, when it appears that the vendee has transferred all his right to his assignee, and that the assignee has been accepted by the vendor as the purchaser, has paid nine-tenths of the purchase money, has entered into possession of the lands and rented them, and has tendered a small balance of the purchase money, and demanded the clearing of the title and the delivery of a deed, his right to which was admitted by the vendor. Such acts of part performance are sufficient to establish a mutual contract between the vendor and the assignee. *Cramer v. Mooney*, 59 N. J. Eq. 164 (44 Atl. Rep. 625).

**Sec. 879. Tender of performance by one succeeding to interest of some of the vendee's heirs.** Upon the death of a vendee who has been in possession of land for several years under a contract of purchase, paying taxes, making improvements and paying interest on the purchase price, one who has succeeded to the interests of some of her heirs by virtue of a deed from them, after service of notice by the vendor upon the heirs of the vendee requiring payment of

the purchase price within a specified time, in default of which the contract would be forfeited, may protect his own interest and the interests of the other heirs by tendering to the vendor the full amount due, such tender being sufficient to put the vendor on inquiry as to the purchaser's right to make it. *Poehler v. Reese*, 78 Minn. 71 (80 N. W. Rep. 847).

**Sec. 880. Construction of land contracts—Forfeitures.**

Provisions in a land contract relating to forfeiture on account of the nonpayment of the purchase money are for the benefit of the vendor. *Zunkel v. Colson*, 109 Ia. 695 (81 N. W. Rep. 175). A stipulation in a contract of purchase in which the price is to be paid in installments, providing that in case of default for the stipulated time "this agreement shall be null and void," means that the agreement is void at the option of the vendor, and the vendee, by making default, cannot avoid payment of the price. *Meagher v. Hoyle*, 173 Mass. 577 (54 N. E. Rep. 347). To the same effect is the case of *Shenners v. Pritchard*, 104 Wis. 287 (80 N. W. Rep. 458). Equity will relieve against a stipulation for the forfeiture of a 5 per cent. cash payment amounting to \$12,500, in the event the second payment should not be made at the time specified, where the damages resulting from the nonperformance readily are ascertainable. *Allison v. Cocke's Ex'rs*, Ky. (51 S. W. Rep. 593; 21 Ky. Law Rep. 434). A vendor who would take advantage of his right to elect to declare a forfeiture on account of a default on the part of the vendee, must act promptly, and he cannot make such election to the injury of the other party who has expended money and labor relying upon the existence of the contract. *Boyum v. Johnson*, 8 N. Dak. 306 (79 N. W. Rep. 149). Where time is stated to be of the essence of a contract to convey land, if the parties treat the time clause as waived or suspended, one of them cannot suddenly insist upon a forfeiture, but must, in order to then avail himself of it, give reasonable, definite and specific notice of his changed intention. *Eaton v. Schneider*, 185 Ill. 508 (57 N. E. Rep. 421). Where, in a contract for the sale of land in which time is made the essence, the stipulations as to the conveyance and the payment of the purchase money are such as

to create mutual conditions, neither party can maintain an action against the other without averring performance, or the actual offer to perform, his part; mere allegations of the willingness or readiness to perform, uncommunicated to the other party, or that the latter has refused to comply with his contract, although requested to do so, are not sufficient. *Raudabaugh v. Hart*, 61 O. St. 73 (55 N. E. Rep. 214; 76 Am. St. Rep. 361). For note on "Effect of stipulation that vendee or mortgagor shall, on default, become a tenant," see 49 L. R. A. 435-439.

**Sec. 881. Construction of land contracts—Particular cases.** When the time of performance is not specified by the contract of sale, and the parties arrange for the removal of an incumbrance prior to performance, without naming a specific day, the removal within a reasonable time is a sufficient performance. *Cramer v. Mooney*, 59 N. J. Eq. 164 (44 Atl. Rep. 625). A contract by one to give another all his "earthly lands and money on hands at" his death, but which specifies no particular lands, is merely an executory contract to convey lands of which the contracting party might die seized and does not create a vested interest in his lands or apply to lands which he subsequently conveys before his death. *Stidham v. McCarver*, Tenn. (57 S. W. Rep. 212). Particular contract for the sale of land held not to be unconscionable. *Meagher v. Hoyle*, 173 Mass. 577 (54 N. E. Rep. 347). For construction of particular contract providing for the payment of purchase money in crops raised on the land, see *Boyum v. Johnson*, 8 N. Dak. 306 (79 N. W. Rep. 149). For construction of particular land contracts, see *Smith v. Northern Pac. R. Co.*, 22 Wash. 500 (61 Pac. Rep. 255); *Nelson v. Sanders*, 123 Ala. 615 (26 So. Rep. 518); *White v. Needham*, Ky. (54 S. W. Rep. 9; 21 Ky. Law Rep. 1051).

**Sec. 882. Deficiency in quantity.** A vendee cannot recover for a deficiency in the quantity of land where there was no covenant as to quantity, unless he show that the vendor falsely and fraudulently represented the number of acres in the lands described, or that he purchased the lands by the acre, and that the amount paid was in excess of the sum he agreed to pay. *Lane v. Parsons*, 108 Ia. 241 (79

N. W. Rep. 61). Citing, *Hosleton v. Dickinson*, 51 Ia. 244 (1 N. W. Rep. 550); *Belknap v. Sealey*, 14 N. Y. 151 (67 Am. Dec. 120); *Ward v. Dean*, 69 Minn. 466 (72 N. W. Rep. 710); *Canal Co. v. Emmett*, 9 Paige, 168; *Powell v. Clark*, 5 Mass. 355 (4 Am. Dec. 67); *Allen's Ex'x v. Shriver's Adm'r*, 81 Va. 174; *Pickman v. Trinity Church*, 123 Mass. 1 (25 Am. Rep. 1); *Noble v. Googins*, 99 Mass. 235; *Stebbins v. Eddy*, 4 Mason, 414 (Fed. Cas. No. 13342).

**Sec. 883. Rescission of contract for mutual mistake as to quantity.** A vendee may have a rescission, where, through a mistake in pointing out the boundaries, mutually and honestly made by the parties, he gets about half the quantity of land he bargained for and less than half in value, although there was no fraud or intentional misrepresentation and the deed described the land as so many acres "more or less." *Bigham v. Madison*, 103 Tenn. 358 (52 S. W. Rep. 1074; 47 L. R. A. 267). The court say: "It is well settled that a vendee of land, when it is sold in gross, or with the description 'more or less,' or 'about,' does not thereby, ipso facto, take all risk of quantity in the contract. *Kerr, Fraud & M.* § 65; 15 Am. & Eng. Enc. Law, p. 718; 1 Jones, Real Prop. § 407; 2 Warv. Vend. p. 839; *Skinner v. Walker*, 98 Ky. 729 (34 S. W. Rep. 233); *Drake v. Eubanks*, 61 Ark. 120 (32 S. W. Rep. 492). It is also well established that the use of the words 'more or less,' or 'about,' or similar words, in designating quantity, although they show a sale in gross, and not by the acre, covers only a reasonable excess or deficiency. 2 Warv. Vend. p. 839; 1 Jones, Real. Prop. § 407; *Kerr, Fraud & M.* § 65; 1 Story, Eq. Jur. 141; 15 Am. & Eng. Enc. Law, pp. 718, 719; *Belknap v. Sealey*, 14 N. Y. 143 (67 Am. Dec. 120); *Harrell v. Hill*, 19 Ark. 102 (68 Am. Dec. 212); *Drake v. Eubanks*, 61 Ark. 120 (32 S. W. Rep. 492); *Stebbins v. Eddy*, 4 Mason, 414 (Fed. Cas. No. 13342); *Couse v. Boyles*, 3 Gr. Ch. 212 (38 Am. Dec. 514); *Pratt v. Bowman*, 37 W. Va. 715 (17 S. E. Rep. 210); *Wheeler v. Boyd*, 69 Tex. 293 (6 S. W. Rep. 614); *Newton v. Tolles*, 66 N. H. 136 (19 Atl. Rep. 1092; 9 L. R. A. 50; 49 Am. St. Rep. 593). It has been held that such discrepancy in quantity, in order to be covered by such terms, should not exceed 10 to 15 per cent., even when sales are confessedly in gross, and

20 per cent. is too great a difference to be so covered. 15 Am. & Eng. Enc. Law, p. 718. And 33 1-3 per cent. is such an amount as universally has obtained relief. 4 Kent Comm. (12th Ed.) 467. *Harrell v. Hill*, 19 Ark. 102 (68 Am. Dec. 212); *Harrison v. Talbot*, 2 Dana, 258. Mutual mistake of the contracting parties to a sale, in regard to the subject-matter of the sale, which is so material as to go to the essence of the contract, is, by all the cases, a ground for relief and rescission in a court of equity. *Belknap v. Sealey*, 14 N. Y. 143 (67 Am. Dec. 120); *Harrell v. Hill*, 19 Ark. 102 (68 Am. Dec. 212); *Couse v. Boyles*, 3 Gr. Ch. 212 (38 Am. Dec. 514); *Camp v. Norfleet's Adm'x*, 83 Va. 380 (5 S. E. Rep. 375); *Wheeler v. Boyd*, 69 Tex. 293 (6 S. W. Rep. 614); *Boyd v. Moss*, 15 Tex. Civ. App. 222 (39 S. W. Rep. 983); *Skinner v. Walker*, 98 Ky. 729 (34 S. W. Rep. 233); *Newton v. Tolles*, 66 N. H. 136 (19 Atl. Rep. 1092; 9 L. R. A. 50; 49 Am. St. Rep. 593); *Hays v. Hays*, 126 Ind. 92 (25 N. E. Rep. 600; 11 L. R. A. 376); *Hosleton v. Dickinson*, 51 Ia. 244 (1 N. W. Rep. 550); 1 Jones, Real Prop. § 407; 2 Warv. Vend. pp. 339, 340. It has also been held that, even when the parties saw the premises and knew the boundaries, it cannot prevent relief when there was mutual gross mistake as to quantity. *Belknap v. Sealey*, 14 N. Y. 143 (67 Am. Dec. 120); *Paine v. Upton*, 87 N. Y. 327 (41 Am. Rep. 371); *Newton v. Tolles*, 66 N. H. 136 (19 Atl. Rep. 1092; 9 L. R. A. 50; 49 Am. St. Rep. 593); *Drake v. Eubanks*, 61 Ark. 120 (32 S. W. Rep. 492); *Hosleton v. Dickinson*, 51 Ia. 244 (1 N. W. Rep. 550). And the relief will be granted in executed as well as executory contracts. *Belknap v. Sealey*, 14 N. Y. 143 (67 Am. Dec. 120); *Harrison v. Talbot*, 2 Dana, 259; *Skinner v. Walker*, 98 Ky. 729 (34 S. W. Rep. 233); 2 Warv. Vend. p. 840. And relief will be granted when the mistake is so material that, if the truth had been known to the parties, the trade would not have been made. *Belknap v. Sealey*, 14 N. Y. 143 (67 Am. Dec. 120); *Pratt v. Bowman*, 37 W. Va. 715 (17 S. E. Rep. 210); *Camp v. Norfleet's Adm'x*, 83 Va. 380 (5 S. E. Rep. 375); *Hosleton v. Dickinson*, 51 Ia. 244 (1 N. W. Rep. 550); 2 Warv. Vend. 227. And if quantity entered into consideration in fixing price, and price is fixed upon an estimate of quantity that proved grossly incorrect, relief will be granted. *Hill v.*

Buckley, 17 Ves. 394, Pratt v. Bowman, 37 W. V. 715 (17 S. E. Rep. 210); Camp v. Norfleet's Adm'x, 83 Va. 380 (5 S. E. Rep. 375); Drake v. Eubanks, 61 Ark. 120 (32 S. W. Rep. 492); Wheeler v. Boyd, 69 Tex. 293 (6 S. W. Rep. 614); Hays v. Hays, 126 Ind. 92 (25 N. E. Rep. 600; 11 L. R. A. 376); Skinner v. Walker, 98 Ky. 729 (34 S. W. Rep. 233); Waters v. Hutton, 85 Tenn. 114 (1 S. W. Rep. 787); Meek v. Bearden, 5 Yerg. 467; 2 Warv. Vend., 838, 839. It is not necessary that fraud be shown, in order to obtain relief. Innocent and mutual mistake alone are sufficient grounds for rescission and other relief. Couse v. Boyles, 3 Gr. Ch. 212 (38 Am. Dec. 514); Hill v. Buckley, 17 Ves. 394; Newton v. Tolles, 66 N. H. 136 (19 Atl. Rep. 1092; 9 L. R. A. 50; 49 Am. St. Rep. 593); Hays v. Hays, 126 Ind. 92 (25 N. E. Rep. 600; 11 L. R. A. 376); King v. Doolittle, 1 Head, 78; Barnes v. Gredory, 1 Head, 231; Harding v. Egin, 2 Tenn. Ch. 41; Cook v. Manufacturing Co., 1 Sneed, 716; Gillespie v. Moon, 2 Johns. Ch. 585 (7 Am. Dec. 559); 1 Story, Eq. Jur. § 155; Helm v. Wright, 2 Humph. 72; Cromwell v. Winchester, 2 Head, 390; Barnes v. Gregory, 1 Head, 230; Horn v. Denton, 2 Sneed, 125; 2 Pom. Eq. Jur. § 856, and note. There are differences in sales in gross, such as are evidenced by the expressions 'more or less,' 'about,' 'by estimate,' and sales at 'hazard,' when quantity is not regarded or material or estimated. In the first class of cases relief will be granted. In the latter it will not. Pratt v. Bowman, 37 W. Va. 715 (17 S. E. Rep. 210); Camp v. Norfleet's Ex'x, 83 Va. 380 (5 S. E. Rep. 375); Waters v. Hutton, 85 Tenn. 109 (1 S. W. Rep. 787); Frenche v. Chancellor, 51 N. J. Eq. 624 (27 Atl. Rep. 140; 40 Am. St. Rep. 548); Harrison v. Talbot, 2 Dana, 259; Skinner v. Walker, 98 Ky. 729 (34 S. W. Rep. 233); 2 Warv. Vend. p. 926. It is true, a purchaser can have no relief when he sues for lands not pointed out to him, and that he did not buy. Waters v. Hutton, 85 Tenn. 109 (1 S. W. Rep. 787); Moses v. Wallace, 7 Lea, 413; Blake-more v. Kimmons, 8 Baxt. 473; Meek v. Bearden, 5 Yerg. 467. But, while this is true, if the lines are pointed out, and the parties are mutually and honestly mistaken as to their location and as to the land embraced, when the mistake is material, and when the purchaser does not get the land he intended to buy, and which the vendor thought he

was selling, and had a right to sell, it will be ground for relief and rescission upon the ground of mutual mistake which was equivalent to fraud in law."

**Sec. 884. Failure of title—Rescission—Waiver.** A vendee in the undisturbed possession of land cannot have a rescission of the contract of sale on account of its being void by reason of his vendor's coverture of which he had knowledge at the time, where it appears that before final payment of the purchase price the vendor became discoverd and tendered a new and sufficient deed. *Holmes v. Holmes*, Ky. (53 S. W. Rep. 29; 21 Ky. Law Rep. 831). Where a vendee with knowledge of all the facts, after numerous delays, on account thereof, waives a defect in his vendor's title, such waiver will be deemed to relate back to the time when the contract was required to be completed, and he will be required to perform it as of that date. *Steiner v. Fourth Presbyterian Church*, 162 N. Y. 322 (56 N. E. Rep. 985).

**Sec. 885. Action to recover purchase money.** A vendee purchasing from several parties some of whom are minors who gives his note for the purchase price of the land payable on condition that minor vendors who will arrive at majority before the maturity of the note shall execute a deed to the maker thereof for their interest in the land, is liable to the other vendors for their proportionate share of the note upon failure of one of the minors to comply with the condition as to his execution of the conveyance, where such vendee cannot place the parties in statu quo and is unwilling to surrender the land without compensation for improvements made by him. *Archer v. Turrell*, 66 Ark. 171 (49 S. W. Rep. 568). A complaint in an action to recover an installment of purchase money due need not show performance or tender of performance or readiness and ability to perform on the part of the plaintiff, where the time for the payment of the last installment and for the execution of the conveyance by the plaintiff has not arrived at the commencement of the action. *Wile v. Rochester Imp. Co.*, 24 Ind. App. 422 (56 N. E. Rep. 928). Where, through the fault of the vendee, the completion of a contract for the purchase of unproductive real estate is de-

layed beyond the time fixed for its completion, he is liable to his vendor for interest on the purchase price from that date, and any taxes paid by the latter. *Latrobe v. Winans*, 89 Md. 636 (43 Atl. Rep. 829). Foreclosure of a purchase money mortgage given on the execution of a deed conveying the legal title to mortgagor, and a sale of a portion of the land under the decree, deprive the vendor of the legal title to the land not sold, and vest it in the vendee. *Gardener v. Griffith*, 93 Tex. 355 (55 S. W. Rep. 314). Purchase money paid in pursuance of a parol contract to convey land which cannot be enforced may be recovered. *Curnette v. Curnette*, Ky. (55 S. W. Rep. 422; 21 Ky. Law Rep. 1422). For Kansas statute regulating the foreclosure of purchase money liens upon real estate, see Laws 1901, p. 479.

**Sec. 886. Defenses to action for purchase money.** A defense on the ground of breach of covenant against incumbrance is sufficient to defeat an action for the recovery of the purchase price until such incumbrance be removed. *Warren v. Stoddart*, Ida. (59 Pac. Rep. 540). A vendee cannot defend against an action to recover the purchase money on account of his vendor having acquired a tax title to the premises subsequent to the conveyance of them to the vendee by warranty deed where, under a statute (S. Dak. Comp. Laws, § 3254, subd. 4), the title subsequently acquired by such grantor would pass to his grantee. *Zerfing v. Seeling*, 12 S. Dak. 25 (80 N. W. Rep. 140). A vendee continuing in possession cannot refuse to pay the balance of the purchase price because of the existence of a judgment lien, the amount of which the vendor deposits in court; nor because of his vendor's dedication of a portion of the land to the use of the public for a street and alley, the only effect of which would deprive him of the use of the surface of a small and inconsiderable part of the land sold. *Florence Oil & Refining Co. v. McCandless*, 26 Colo. 534 (58 Pac. Rep. 1084). The right of a vendor in a title bond for the conveyance of lots to several persons who have subscribed for their purchase, to recover the purchase price is not affected by the fact that the lots were distributed among the several purchasers by a scheme in the nature of a lottery, where such scheme was not dis-



closed by the terms of the bond and the vendor neither participated in nor had knowledge of it. *Wile v. Rochester Imp. Co.*, 24 Ind. App. 422 (56 N. E. Rep. 928). The obligee in a bond for title, who has paid a part of the purchase money for the land to which the bond relates, may, when sued by the maker of the bond upon a note given for the balance, recoup his damages resulting from a breach of the bond, notwithstanding he retains possession of the land; he having at the maturity of the note offered to pay the same, and demanded compliance with the terms of the bond, and by his plea offering to surrender possession, and to account for rents during the time of his occupation of the premises. *Preston v. Walker*, 109 Ga. 290 (34 S. E. Rep. 571).

**Sec. 887. Defenses to action for purchase money—**  
**Defective title.** A vendee cannot both refuse to pay the purchase price and retain possession on account of a defect in his vendor's title. *Haile v. Smith*, 128 Cal. 415 (60 Pac. Rep. 1032). A vendee cannot defeat an action brought by the administrator and heirs at law of his vendor to recover the balance of purchase money due, on the ground that no deed was tendered, where the plaintiffs who, on account of their disabilities, could not make a deed, but averred their willingness to have a deed made by the court. *Ashcraft v. Sale*, Ky. (54 S. W. Rep. 730; 21 Ky Law Rep. 1198). A vendee defending against an action for the purchase money on the ground of the failure of the vendor's title has the burden of showing such want of a title. *Zerfing v. Seeling*, 12 S. Dak. 25 (80 N. W. Rep. 140). Citing, *Ingalls v. Eaton*, 25 Mich. 32; *Landt v. Major*, 2 Colo. App. 551 (31 Pac. Rep. 524); *Hamilton v. Shoaff*, 99 Ind. 63; *Wooley v. Newcombe*, 87 N. Y. 605; *Hartshorn v. Cleveland*, 52 N. J. L. 473 (19 Atl. Rep. 974); *Lathrop v. Grosvenor*, 10 Gray, 52; *Jerald v. Elly*, 51 Ia. 321 (1 N. W. Rep. 639). A purchaser of land, who is in possession under a bond for titles, cannot have relief in equity against his contract to pay, on the mere ground of a defect in title, unless he alleges that the vendor is insolvent or a nonresident, or some other fact which would make it inequitable for the vendor to enforce the payment of the purchase money; and where in-

solvency of the vendor is relied upon to create an exception to the rule, the plea must allege facts clearly showing such insolvency. *Mallord v. Allred*, 106 Ga. 503 (32 S. E. Rep. 588).

**Sec. 888. Vendee's equitable lien for purchase money paid.** The equitable lien of a vendee for payments of purchase money made by him in pursuance of a parol purchase of land, is not lost by a suit to set aside the purchase and recover the money paid in which the attachment of the land is sought, by the defendant giving a replevin bond, under Shannon's Tenn. Code, § 5269 (Mill. & V. Code, § 4250), "conditioned to pay debt, interest, and cost, or value of property attached." *Chrisenberry v. Wylie*, Tenn. (54 S. W. Rep. 49).

**Sec. 889. Retention of title to secure purchase money.** An executory contract for the sale of land vests the equitable ownership of the property in the purchaser, and in such case the seller retains the legal title as security for the deferred installments of the purchase price. *Jewett v. Black*, 60 Neb. 173 (82 N. W. Rep. 375). For construction of particular clause in a bond for a deed reserving title to future crops to secure payment of the purchase price, see *Turney v. Gillett*, 71 Vt. 187 (44 Atl. Rep. 95).

**Sec. 890. Vendor's lien—Creation of.** Where a husband and wife sell real estate held by them by entireties she may enforce a vendor's lien for the unpaid purchase money after his death. *Kulling v. Kulling*, 124 Mich. 56 (82 N. W. Rep. 847). Where one of two administrators purchases lands of the estate at a probate sale thereof and afterwards resigns, the remaining administrator may maintain a suit to enforce a vendor's lien against him upon his failure to pay the purchase price. *Langley v. Langley*, 121 Ala. 70 (25 So. Rep. 707). In an action brought by one who has conveyed land in consideration of his grantee's parol agreement to furnish the grantor support, brought to recover an amount sufficient for his support, upon the grantee's failure to keep his agreement, it is error for the court to render a money judgment for a fixed and continuing amount and declare the same a lien

on the land; as a vendor's lien cannot arise to secure the performance of an act, the nonperformance of which would make a claim for unliquidated damages. *Salysers v. Smith*, 67 Ark. 526 (55 S. W. Rep. 936). Where, upon the purchase of real property for a certain sum, the vendee agrees to pay a certain portion of that sum by paying the promissory note of the vendor held by a specified bank, such agreement or promise does not constitute payment, as between the vendor and vendee; and if the promise be not performed, the debt for purchase price still exists to that extent, and the vendor thereafter may bring suit against the vendee, and have a vendor's lien upon the realty established for such unpaid portion of the purchase price, and his right to bring such action does not depend upon his precedent payment of his note to the bank, provided his obligation be still outstanding. *Bray v. Booker*, 8 N. Dak. 347 (79 N. W. Rep. 293). Where a vendee assigns notes as the consideration for land, a vendor's lien retained in a deed to him secures only his implied liability as assignor, and the lien is discharged when he is released from this liability. *Pritchett v. Hape*, Ky. (51 S. W. Rep. 608; 21 Ky. Law Rep. 408). One entitled to receive a legacy under a will who receipts the executor thereof for the amount upon the express promise of a purchaser of real estate from him that he will pay the legacy out of the purchase price, may enforce a lien against such real estate for the amount due her on her legacy; and her right to such a lien is not waived by her giving the purchaser an option of paying the amount due her by conveying a part of said real estate to her instead of paying the sum in money. *Forsythe v. Brandenburg*, 154 Ind. 588 (57 N. E. Rep. 247). In support of the last proposition stated above, the court cite *Warv. Vend.* 707; 28 Am. & Eng. Enc. Law, 165, 166; *Harvey v. Kelley*, 41 Miss. 490 (93 Am. Dec. 267); *Deason v. Taylor*, 53 Miss. 697, 700; *Winters v. Fain*, 47 Ark. 493 (1 S. W. Rep. 711); *Plowman v. Riddle*, 14 Ala. 169 (48 Am. Dec. 92).

**Sec. 891. Vendor's lien—Priority—Assignment.** A vendor's lien will not be given preference over a subsequent bona fide mortgage lien, even though a judgment lien intervenes; but in such a case the proceeds of the

property will be applied first to the payment of the judgment creditor and then to the mortgagee. *Campbell v. Sidwell*, 61 O. St. 179 (55 N. E. Rep. 609). An ordinary vendor's lien arising by implication of law is personal and cannot be assigned; but where the lien is expressly reserved in the deed it is in the nature of a mortgage, is transferrable, and the assignee may enforce it in a court of equity. *Gordon v. Johnson*, 186 Ill. 18 (57 N. E. Rep. 790).

**Sec. 892. Vendor's lien—Loss or waiver.** The burden is on the vendee to show that his vendor's lien has been waived or displaced, *Dowling v. McCall*, 124 Ala. 633 (26 So. Rep. 959); and so long as the debt exists the lien will not be presumed to have been waived except upon clear and convincing testimony, *Selna v. Selna*, 125 Cal. 357 (58 Pac. Rep. 16; 73 Am. St. Rep. 47). A vendor's lien is not extinguished by the death of the vendee. *Berger v. Berger*, 104 Wis. 282 (80 N. W. Rep. 585; 76 Am. St. Rep. 877). The mere taking of a note by a vendor for the purchase money due him does not operate to waive his right to a lien, where it does not clearly appear that such was his express agreement, *Zook v. Thompson*, 111 Ia. 463 (82 N. W. Rep. 930); but the taking of a mortgage to secure a part of the purchase price of land operates as a waiver of any vendor's lien, *Mason v. Daily*, N. J. Eq. (44 Atl. Rep. 839). A vendor may waive his right to a vendor's lien by any language or conduct clearly manifesting an intention to waive the same, but such waiver cannot be presumed from the simple fact that the vendor executed the deed after the vendee had refused to mortgage the property to secure the purchase price, and had stated that he desired to receive the property free from all incumbrances. *Bray v. Booker*, 8 N. Dak. 347 (79 N. W. Rep. 293). A vendor of an undivided tract of land who afterwards procures a partition sale thereof at which he purchases the land, thereby waives his vendor's lien. *Pearce v. Lancaster*, Ky. (49 S. W. Rep. 12; 20 Ky. Law Rep. 1218). A vendor, whose lien against land, in which a homestead is assigned to his debtor, has priority even against the claim of homestead, waives his right to enforce the lien against the

homestead where he permits the proceeds of the remainder of the land to be applied to the payment of inferior liens, as against which the debtor was entitled to a homestead. *Ralls v. Prather*, Ky. (51 S. W. Rep. 318; 21 Ky. Law Rep. 322). As against an assignee of a title bond which fails to show that any part of the purchase price remains unpaid, a vendor's lien therefor is waived by his surrendering the note of the purchaser given for the price and accepting in lieu thereof a new note executed by him and a third party. *Brown v. Blankenship*, Ky. (56 S. W. Rep. 817; Ky. Law Rep. ).

**Sec. 893. Vendor's lien—Waiver—Filing claim against estate of deceased vendee.** A vendor's right to a lien for the unpaid balance of the purchase money due him is not waived by his filing and obtaining an allowance of that amount as a claim against the estate of his deceased vendee. *Selna v. Selna*, 125 Cal. 357 (58 Pac. Rep. 16; 73 Am. St. Rep. 47). The court say: "The question as to what constitutes a waiver of this lien of the vendor has been a source of much controversy. The authorities generally agree that, to constitute a waiver of the lien, there must be some act or omission by the vendor showing an intention on his part to waive the lien. The rule is thus stated in *Overt. Liens*, § 622: 'To constitute a waiver of the right to the lien, there must be some act or omission by the vendor which actually or impliedly evinces an intention on his part to dispense with the security given him in equity. Therefore, in any question of this character, the point to determine will be, has the vendor, by such an act or omission, so placed his rights in relation to the lands sold or to the vendee that it would be inequitable to sustain this right in his favor? Or has his act been such that it shows a determination not to rely upon his lien?' And to the same effect are the following authorities: 2 *Jones, Liens*, § 1073; 2 *Warv. Vend.*, p. 712; Note to *Mackreth v. Symmons*, 1 *White & T. Lead. Cas. Eq.*, Pt. 1, pp. 482-484. Applying the rule thus laid down, was the act of plaintiff in filing his claim such an act as would make it inequitable to allow him to sustain his lien, or such that it showed a determination on his part not to rely upon it? We think that the mere fact

of making out and filing the claim did not show any determination or intention of plaintiff not to rely upon his lien. \* \* \* The filing of the claim did not give plaintiff any security upon any specific property, nor any lien upon any property. It is stated by the authorities that if the vendor recover a judgment at law, and has not exhausted his remedy by execution, he is not precluded thereby from proceeding to enforce his equitable lien for the purchase money. *Walker v. Sedgwick*, 8 Cal. 404; *Overt. Liens*, p. 691; *McAlpin v. Burnett*, 19 Tex. 497; *Dubois v. Hull*, 43 Barb. 26; 2 Warv. Vend., p. 719; *Palmer v. Harris*, 100 Ill. 276; *Chapman v. Lee*, 64 Ala. 483."

**Sec. 894. Action to enforce vendor's lien—Pleading and practice—Sale—Title of purchaser.** A vendor who has taken from his vendee a note for the unpaid purchase price payable in monthly installments cannot maintain an action to enforce a vendor's lien until there is default in the payment of such note. *Dowling v. McCall*, 124 Ala. 633 (26 So. Rep. 959). Under Va. Laws 1897-98, p. 437, an action to enforce a vendor's lien may be maintained in the name of a debtor by a creditor, for his benefit. *National Exchange Bank v. Preston*, Va. (33 S. E. Rep. 546). Objections to the sufficiency of the complaint in an action to enforce a vendor's lien cannot be raised for the first time on appeal. *Jones v. Rush*, 156 Mo. 364 (57 S. W. Rep. 118). The equitable owner of purchase money notes secured by a vendor's lien expressly reserved in a deed, on account of which they were executed, is a necessary party to a suit to enforce such lien. *Gordon v. Johnson*, 186 Ill. 18 (57 N. E. Rep. 790). A wife is not a necessary party to an action to foreclose a vendor's lien on land sold to her husband although they occupy a part of it as a homestead. *Fowler v. Bracey*, 124 Mich. 250 (82 N. W. Rep. 892). For particular case in which a married woman purchasing property subject to a vendor's lien was held a necessary party to its foreclosure, see *Williamson v. Conner*, 92 Tex. 581 (50 S. W. Rep. 697). The holder of a vendor's lien note cannot set up the plea of the statute of limitations to defeat the lien of a similar note in the hands of another party, no such plea having been made by the maker of the note. *Columbia Ave. Sav. Fund*,

Safe-Dep., T. & T. Co. v. Strawn, 93 Tex. 48 (53 S. W. Rep. 342). In Texas it is held that a vendor of land expressly reserving a lien for the unpaid purchase price holds the legal title in trust for the vendee, and an assignee of a note given for the purchase price takes no title to the property, but simply a right to subject the land to the payment of the note and his right to enforce such lien is gone when the note is barred by limitations. *Farmers' L. & T. Co. v. Beckley*, 93 Tex. 267 (54 S. W. Rep. 1027). A decree rendered in an action to foreclose a vendor's lien will not be vacated on motion of the plaintiff in order to correct an error in the description of the land, where it is sufficient to pass title. *Mansel v. Castles*, 93 Tex. 414 (55 S. W. Rep. 559). Where, in an action to enforce a vendor's lien against tenants in common for purchase money due by them jointly, no pleadings are filed setting up rights to contribution existing between them, it is error for a court to direct the sale of one of their interests first and exempt the other interest from sale unless needed to pay a deficit; but it should decree a sale of a sufficiency of the whole property and the interest of every defendant therein to pay the purchase money debt, leaving them to institute proceedings to adjust their rights of contribution, if any exist between them, as they may see proper. *Walker v. Sarven*, 41 Fla. 210 (25 So. Rep. 885). Construing Tenn. Code 1858, § 2970, 2998, 3002-3007, it is held that a master authorized to sell land under a decree to foreclose a vendor's lien thereon, may issue an execution for an unpaid balance although not authorized so to do by the express terms of the decree. *Hyder v. Butler*, 103 Tenn. 289 (52 S. W. Rep. 876). A purchaser at a foreclosure sale had under a vendor's lien takes subject to the right of the holder of a subsequent vendor's lien, who is not made a party to the proceedings, to pay off the first lien. *Spencer v. Jones*, 92 Tex. 516 (50 S. W. Rep. 118; 71 Am. St. Rep. 870). Where a vendor of real property, who retains the superior title to the land, sells the land upon foreclosure of his vendor's lien, the purchaser becomes the owner of the legal title and the debt for the purchase money, by subrogation, with the same rights as the vendor as against purchasers of the vendee, who had not been made parties to the foreclosure suit. *Thomp-*

son v. Robinson, 93 Tex. 165 (54 S. W. Rep. 243; 77 Am. St. Rep. 843).

**Sec. 895. Action to enforce vendor's lien against a married woman—Defenses.** A married woman accepting a deed for land which retains a lien for the purchase price cannot defeat the enforcement of such lien by showing that the notes given by her for the purchase money are void. *Weller v. Monroe*, Ky. (55 S. W. Rep. 1078; 21 Ky. Law Rep. 1705). The court say: "The right to subject the same to the payment of the purchase arises, not from the notes, but from the deed; the reason for the rule being that, 'having accepted the vendor's title to the land, she is estopped from denying him the right to subject the same to the payment of the purchase money.' *Bybee v. Smith*, 88 Ky. 648 (11 S. W. Rep. 722); *Adams v. Feeder*, Ky. (41 S. W. Rep. 275). This rule has the support of the United States Supreme Court—*Chilton v. Lyons*, 2 Black, 458 (17 L. Ed. 304),—and has, so far as we have seen, been universally followed in the state courts. *Perry v. Roberts*, 30 Ind. 244 (95 Am. Dec. 689); *Jackson v. Rutledge*, 3 Lea, 626 (31 Am. Rep. 655); *Cashman v. Henry*, 75 N. Y. 103 (31 Am. Rep. 437); *Kent v. Gerhard*, 12 R. I. 92 (34 Am. Rep. 612); *Johnson v. Jones*, 51 Miss. 860."

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## VENDOR'S LIEN—STATUTORY PROVISIONS.

[In Vol. VII, §§ 889-913 will be found a compilation of the statutory provisions of the several states and territories showing how far and in what manner a vendor's lien for unpaid purchase money exists. Below we give such amendments, changes and additional constructions as have been made.]

### **Sec. 896. Alabama.**

(See Vol. VII, § 869.) A vendor's lien arises upon the sale and conveyance of land where the purchase price is not paid at the time. *Wagner v. Brinkerhoff*, 123 Ala. 516 (26 So. Rep. 117). A vendor retains a lien on land for the unpaid purchase money, although he has conveyed to the vendee by absolute deed reciting the payment of the purchase price, which lien will be enforced against all persons except



bona fide purchasers without notice. *Dowling v. McCall*, 124 Ala. 633 (26 So. Rep. 959).

**Sec. 897. Arizona.**

A grantor of real estate by absolute conveyance has no implied equitable lien thereon for the unpaid purchase money. *Baker v. Fleming*, Ariz. (59 Pac. Rep. 101).

**Sec. 898. Georgia.**

(See Vol. VII, § 875.) Where land is sold, and notes are given for a part of the purchase money, with the agreement between the vendor and vendee that the former should have a lien upon the land for the amount of such purchase money notes until the same are paid, and where such agreement is recited and recognized both in the deed from the vendor and in the notes given at the same time by the vendee, a valid equitable lien or mortgage is thereby created upon the property in favor of the vendor and his assigns. One who asserts title to the property by a subsequent conveyance from such vendee, which refers to the foregoing deed for "all necessary purposes," is chargeable in law with notice of the existence of such lien, and acquires the land subject to the equity of the original vendor and his assigns. *Atlanta Land & Loan Co. v. Haile*, 106 Ga. 498 (32 S. E. Rep. 606).

**Sec. 899. Indian Territory.**

A vendor's lien exists without a reservation thereof in the deed, independent of any agreement of the parties. *Hampton v. Mayes*, Ind. Ter. (53 S. W. Rep. 483).

**Sec. 900. Kentucky.**

(See Vol. VII, § 881.) As between the parties, a vendor's lien may be enforced for any portion of the purchase money which clearly appears to be unpaid, although such lien is not retained in the deed. *White v. Taylor*, Ky. (52 S. W. Rep. 820; 21 S. W. Rep. 602).

**Sec. 901. Louisiana.**

(See Vol. VII, § 882.) One selling real property on terms of credit, and retaining a vendor's lien and mortgage on the property sold as security for the purchase price, subsequent to the passage of the license statute of 1894 (Laws 1894, No. 106), conferring a first lien and privilege on all property, real and personal, of the license debtor, in favor of the state and parish, must be presumed to have possessed full knowledge thereof, and made the sale subject to the contingency that said privilege of the state and parish might prime his mortgage and vendor's lien on the proceeds of its sale. *Frazee v. Dupre*, 51 La. Ann. 411 (25 So. Rep. 260).

**Sec. 902. Missouri.**

(See Vol. VII, § 889.) A vendor's lien is not the result of a direct contract therefor. It arises by implication of law out of the sale of land, and exists in favor of the grantor against the grantee as a security for what remains of the purchase money unpaid and otherwise unsecured. *Jones v. Rush*, 156 Mo. 364 (57 S. W. Rep. 118).

**Sec. 903. North Dakota.**

(See Vol. VII, § 898.) Under Rev. Codes, § 4830 a vendor who takes his vendee's note for a portion of the purchase price, accompanied with collateral security, in order to make it negotiable at a bank, thereby waives his right to a lien for the amount represented by such note. *Bray v. Booker*, 8 N. Dak. 347 (79 N. W. Rep. 293).

**Sec. 904. Oklahoma.**

(See Vol. VII, § 900.) Laws 1895, p. 164, provides: "One who sells real property has a special vendor's lien thereon independent of possession, for so much of the price as remains unpaid and unsecured, otherwise than by the personal obligation of the buyer, subject to the rights of purchasers and incumbrancers in good faith without notice." *Craggs v. Earls*, 8 Okla. 462 (58 Pac. Rep. 637). Stat. 1893, § 3206 construed and applied. *Richardson v. Fellner*, 9 Okla. 513 (60 Pac. Rep. 270).

**Sec. 905. Tennessee.**

(See Vol. VII, § 906.) Upon a review of the authorities, the supreme court of Tennessee hold that a vendor who sells and conveys real estate, without reserving a specific lien, may enforce his equity, as against his vendee and mere volunteers, at any time before their conveyance of the property; but, as against purchasers from and creditors of the vendee, he comes too late, if he has delayed filing his bill and fixing a charge on the property until after they have acquired rights, and evidenced them through the public records of the state, as the law provides. *Robinson v. Owens*, 103 Tenn. 91 (52 S. W. Rep. 870).

**Sec. 906. Texas.**

(See Vol. VII, § 907.) Where an absolute deed reserves no lien for the price, but the notes given therefor do so, the contract of sale is executory, and the legal title remains in the vendor and may be transferred by him to subsequent holders of the notes. *Anderson v. Silliman*, 92 Tex. 560 (50 S. W. Rep. 576). A vendor of land expressly reserving a lien for the unpaid purchase price holds the legal title in trust for the vendee, and an assignee of a note given for the purchase price takes no title to the property, but simply a right to

subject the land to the payment of the note, and his right to enforce such lien is gone when the note is barred by limitations. *Farmers' L. & T. Co. v. Beckley*, 93 Tex. 267 (54 S. W. Rep. 1027).

**Sec. 907. Wisconsin.**

(See Vol. VII, § 913.) Rev. Stat., § 2271 providing that a homestead, in case of the death of its owner without lawfully devising the same, shall descend to his heirs free of all claims or liens, with certain exceptions not including liens for unpaid purchase money, abrogates, as to such property, the common-law right to acquire a vendor's lien thereon. *Berger v. Berger*, 104 Wis. 282 (80 N. W. Rep. 585; 76 Am. St. Rep. 877).

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## WASTE

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### EPITOME OF CASES.

**Sec. 908. Waste by life tenant—Removal of building and grading of city lot.** R. I. Gen. Laws, ch. 268, § 1, prescribing a penalty for waste by a life tenant, does not make him liable for loss occasioned by accidental fires. *Sampson v. Grogan*, 21 R. I. 174 (42 Atl. Rep. 712; 44 L. R. A. 711). See opinion for exhaustive collation of authorities on the subject of waste. The removal from a city lot by a life tenant, of a large dwelling house, expensive and valuable at the time of its erection, but which by the grading of the streets and the erection of manufacturing plants about it, has become absolutely undesirable as a residence and incapable of any use as business property, and the cutting down of the lot to the grade of the abutting street, so as to make it useful for business purposes, and thus enhancing its value, does not constitute actionable waste, as against the reversioner, with whom no contractual relations exist. *Melms v. Pabst Brewing Co.*, 104 Wis. 7 (79 N. W. Rep. 738; 46 L. R. A. 478). The court, after discussing the general principles of the law of waste, say: "There are no contract relations in the present case. The defendants are the grantees

of a life estate, and their rights may continue for a number of years. The evidence shows that the property became valueless for the purpose of residence property as the result of the growth and development of a great city. Business and manufacturing interests advanced and surrounded the once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by factories and railway tracks, absolutely undesirable as a residence, and incapable of any use as business property. Here was a complete change of conditions, not produced by the tenant, but resulting from causes which none could control. Can it be reasonably or logically said that this entire change of condition is to be completely ignored, and the ironclad rule applied that the tenant can make no change in the uses of the property because he will destroy its identity? Must the tenant stand by and preserve the useless dwelling house, so that he may at some future time turn it over to the reversioner, equally useless? Certainly all the analogies are to the contrary. As we have before seen, the cutting of timber, which in England was considered waste, has become in this country an act which may be waste or not, according to the surrounding conditions and the rules of good husbandry; and the same rule applies to the change of a meadow to arable land. The changes of conditions which justify these departures from early inflexible rules are no more marked nor complete than is the change of conditions which destroys the value of residence property as such, and renders it only useful for business purposes. Suppose the house in question had been so situated that it could have been remodeled into business property; would any court of equity have enjoined such remodeling under the circumstances here shown, or ought any court to render a judgment for damages for such an act? Clearly we think not. Again, suppose an orchard to have become permanently unproductive through disease or death of the trees, and the land to have become far more valuable, by reason of new conditions, as a vegetable garden or wheat field, is the life tenant to be compelled to preserve or renew the useless orchard, and forego the advantages of be derived from a different use? Or suppose a farm to have become absolutely unprofitable by reason of change

of market conditions as a grain farm, but very valuable as a tobacco plantation, would it be waste for the life tenant to change the use accordingly, and remodel a now useless barn or granary into a tobacco shed? All these questions naturally suggest their own answer, and it is certainly difficult to see why, if change of conditions is so potent in the case of timber, orchards, or any kind of crops, it should be of no effect in the case of buildings similarly affected. It is certainly true that a case involving so complete a change of situation as regards buildings has been rarely, if ever, presented to the courts, yet we are not without authorities approaching very nearly to the case before us. Thus, in the case of *Doherty v. Allman*, 3 App. Cas. 709, a court of equity refused an injunction preventing a tenant for a long term from changing storehouses into dwelling houses, on the ground that by change of conditions the demand for storehouses had ceased, and the property had become worthless, whereas it might be productive when fitted for dwelling houses. Again, in the case of *Sherrill v. Connor*, 107 N. C. 630 (12 S. E. Rep. 588), which was an action for permissive waste against a tenant in dower, who had permitted large barns and out-buildings upon a plantation to fall into decay, it was held that, as these buildings had been built before the Civil War to accommodate the operation of the plantation by slaves, it was not necessarily waste to tear them down, or allow them to remain unrepaired, after the war, when the conditions had completely changed by reason of the emancipation, and the changed methods of use resulting therefrom; and that it became a question for the jury whether a prudent owner of the fee, if in possession, would have suffered the unsuitable barns and buildings to have fallen into decay, rather than incur the cost of repair. This last case is very persuasive and well reasoned, and it well states the principle which we think is equally applicable to the case before us."

**Sec. 909. Removal of buildings from mortgaged premises.** A third party who consents to the erection of a building on his land out of material known to him to have been removed from a building on mortgaged premises, is liable to the mortgagee for its value. *Stephens v.*

Smatners, 124 N. C. 571 (32 S. E. Rep. 959). The measure of a mortgagee's damages for the removal of buildings by a mortgagor while in possession is not the value of the buildings after severance, but the diminution in the value of his security. *Field v. Tate*, 57 N. J. Eq. 632 (42 Atl. Rep. 742).

**Sec. 910. Remedies for waste—Injunction.** The statutory remedy for waste provided by R. I. Gen. Laws, ch. 268, does not take away the remedy at common law, but is to be regarded as cumulative and not exclusive. *Thackeray v. Eldigan*, 21 R. I. 481 (44 Atl. Rep. 689). The remedy of the owner of land which has been injured by the removal of timber by one in adverse possession thereof is an action for damages to the freehold, and not the recovery of the note of a third person given to the wrongdoer for the purchase price of such timber. *White v. Fox*, 125 N. C. 544 (34 S. E. Rep. 645; 74 Am. St. Rep. 654). An injunction against waste will not be granted where the injury complained of is susceptible of complete pecuniary satisfaction by the ordinary legal remedies; and an injunction which inhibits a life tenant from "cutting or removing any timber from said land, and from removing the buildings thereon or any part thereof, or from otherwise injuring the same," is entirely too broad and indefinite, and interferes with the life tenant's proper enjoyment of his tenacy, *Greathouse v. Greathouse*, 46 W. Va. 21 (32 S. E. Rep. 994). Remaindermen cannot enjoin the use of a temporary road way constructed and used by a third person under a license from the life tenant, where such use will inflict no injury upon the premises. *Shipp v. McLean*, Tenn. (54 S. W. Rep. 669).

# WATERS AND WATER COURSES

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## EPITOME OF CASES.

**Sec. 911. Subterranean or percolating waters.** The supreme court of Utah, in discussing the nature of property in percolating waters, in the case of Willow Creek Irr. Co. v. Michaelson, 21 Utah, 248 (60 Pac. Rep. 943; 51 L. R. A. 280), say: "In Bloodgood v. Ayres, 108 N. Y. 400 (15 N. E. Rep. 433; 2 Am. St. Rep. 407), Mr. Justice Finch, delivering the opinion of the court, said: 'Such a spring belongs to the owner of the land. It is as much his as the earth or minerals beneath the surface, and none of the rules relating to water courses and their diversion apply. Broadbent v. Ramsbotham, 34 Eng. Law & Eq. 553; Rawstron v. Taylor, 33 Eng. Law & Eq. 435; Village of Delhi v. Youmans, 45 N. Y. 362 (6 Am. Rep. 100); Goodale v. Tuttle, 29 N. Y. 466; Ellis v. Duncan, 21 Barb. 234; Barkley v. Wilcox, 86 N. Y. 147 (40 Am. Rep. 519). The only exception established by the authorities is that of certain underground streams or rivers which are known and notorious, and flow in a natural channel between defined banks. A few exceptions are admitted to exist, and others may occur; but, outside of these, subsurface currents or percolations are not governed by the rules and regulations respecting the use and diversion of water courses, and they may be intercepted or diverted by the owner of the land for any purpose of his own.' In Metcalf v. Nelson, 8 S. Dak. 87 (65 N. W. Rep. 911; 59 Am. St. Rep. 746), it was said: 'As the hidden water in the plaintiff's soil belonged to him as a part of it, he might, by artificial means, separate it from the soil, and it would still belong to him. He might sink a well, into which such water would work its way, and the accumulation in the well would still be his, and subject to his proprietary control.' So, in Frazier v. Brown, 12 O. St. 294, it was observed: 'The law cannot properly limit the ordinarily ab-

solute dominion of the owner of the soil, in respect to things concealed and hidden in the bowels of the earth, nor recognize an adjoining proprietor as having claims upon, or rights in, a thing passing under the surface of his neighbor's land, the existence of which was first revealed by the very act which would constitute the subject-matter of his complaint.' And in *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah, 444 (54 Pac. Rep. 244; 70 Am. St. Rep. 810), this court said: 'The waters issuing from the artificial tunnel into the lake are found to be underground percolating waters from the mining claim of the defendant, and not waters naturally flowing in a stream with a well-defined channel, banks and course. Under such a state of facts the law seems to be well settled that water percolating through the soil is not, and cannot be, distinguished from the soil itself. The owner of the soil is entitled to the waters percolating through it, and such water is not subject to appropriation. The ordinary rules of law applying to the appropriation of surface streams do not apply to percolating water and subterranean streams, with undefined and unknown courses and banks.' *Kin. Irr.*, § 48; *Washb. Easem.*, p. 505, par. 2; *Hanson v. McCue*, 42 Cal. 303 (10 Am. Rep. 299); *Roath v. Driscoll*, 20 Conn. 532; *Halderman v. Bruckhart*, 45 Pa. St. 514 (84 Am. Dec. 511); *Acton v. Blundell*, 12 Mees. & W. 324; *Taylor v. Welch*, 6 Or. 199; *Railroad Co. v. Dufour*, 95 Cal. 615 (30 Pac. Rep. 783; 19 L. R. A. 92); *Ocean Grove v. Asbury Park*, 40 N. J. Eq. 447 (3 Atl. Rep. 168); *Village of Delhi v. Youmans*, 45 N. Y. 362 (6 Am. Rep. 100); *William v. Ladew*, 161 Pa. St. 283 (29 Atl. Rep. 54; 41 Am. St. Rep. 891); *Mosier v. Caldwell*, 7 Nev. 363; *Chase v. Silverstone*, 62 Me. 175; *Chatfield v. Wilson*, 28 Vt. 49; *Trustees v. Youmans*, 50 Barb. 316."

**Sec. 912. Mill dams and water rights—Fish ways.**

As to what constitutes a water course, see *Neal v. Ohio River R. Co.*, 47 W. Va. 316 (34 S. E. Rep. 914). An upper riparian owner is liable for injuries resulting to a lower owner on account of his unreasonable use and management of a dam which he has a right to maintain. *Weare v. Chase*, 93 Me. 264 (44 Atl. Rep. 900). Under a deed from a riparian owner to a city conveying so much of the water



in the stream "as flows by, along, across or upon" his land, made for the express purpose of giving the city the full and unrestricted control of such stream, river or falls for the purpose of maintaining a pure water supply for the use of its inhabitants, the city may dispose of the water to persons not inhabitants thereof. *Mayor of Baltimore v. Day*, 89 Md. 551 (43 Atl. Rep. 798). One who has acquired a prescriptive right to maintain a mill dam on a stream composed of a chain of lakes through which it runs, the effect of which is to create a reservoir extending over a large body of land, the dam being of a perishable nature and he being liable for its maintenance, may sell to the owners of certain of the flooded lands, the right to destroy the dam and reclaim their lands, and other riparian owners cannot enjoin the exercise of this right. *Kray v. Muggli*, 77 Minn. 231 (79 N. W. Rep. 964; 45 L. R. A. 218). A statute (Ia. Laws, 17th Gen. Assem., ch. 188) requiring dam owners within a reasonable time to construct fish ways so as to permit the free passage of fish up and down the water course, and providing for the abatement as a nuisance of any dam whose owner does not comply with the statute, is constitutional as a legitimate exercise of the police power of the state, does not constitute a taking of private property for a public use without just compensation, and applies to the owner of a dam who has acquired a prescriptive right for its maintenance. *State v. Beardsley*, 108 Ia. 396 (79 N. W. Rep. 138). For construction of particular contract concerning the laying, repairing and use of a water pipe from a spring, see *Van Horn v. Clark*, 59 N. J. Eq. 37 (44 Atl. Rep. 643). For construction of particular conveyances of water rights, see *Safford v. Gaysville Mfg Co.*, 71 Vt. 36 (42 Atl. Rep. 615); *Small v. City of Brockton*, 176 Mass. 15 (57 N. E. Rep. 71).

# WILLS

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## EPITOME OF CASES.

**Sec. 913. What constitutes a will.** No set form of words is requisite to the creation of a will; any language indicative of an intent to make a testamentary disposition of property is sufficient. In *re Stumpenhousen's Estate*, 108 Ia. 555 (79 N. W. Rep. 376). An instrument in the handwriting of the testator and signed by him which recites the facts as to the purchase of a tract of land, states its location, and which closes by saying, "and I have requested my executors to give a clear deed for the property, after my death, to Maggie, his wife, and Charley," was held a valid will, devising the property to C. and wife, whose identity was clearly fixed by previous recitals in the instrument. *Webster v. Lowe*, Ky. (53 S. W. Rep. 1030; 21 Ky. Law Rep. 998). For particular instrument held not to be a will, and a discussion as to what constitutes a will, see *Johnson v. Johnson*, 103 Tenn. 32 (52 S. W. Rep. 814). In Wisconsin it is held that a nuncupative will cannot pass real estate or its income arising after the death of the testator. In *re Davis' Will*, 103 Wis. 455 (79 N. W. Rep. 761).

**Sec. 914. Revocation of wills.** Marriage operates per se as a revocation of a will, under a statute providing that "a marriage shall be deemed a revocation of a prior will;" and the statute applies notwithstanding a previous antenuptial contract between the parties in support of the will. *Hudnall v. Ham*, 183 Ill. 486 (56 N. E. Rep. 172; 48 L. R. A. 557; 75 Am. St. Rep. 124). Reviewing the statutes of Nebraska it is held that a will executed by a single woman is revoked by her subsequent marriage, at least to the extent it would operate to exclude her husband from his right as tenant by curtesy in any lands of which she died seized in her own right of an estate of inheritance. *Vanderveer v.*

Higgins, 59 Neb. 333 (80 N. W. Rep. 1043). On the subject of marriage revoking a will, see *Ballards' Law Real Prop.* Vol. VII, § 918. Construing Ia. Code, § 3276, providing that "the subsequent birth of a legitimate child to the testator before his death will operate as a revocation" of the testator's will, and Code 1873, § 2307, conferring upon an adopted child "all the rights, privileges and responsibilities which would pertain to the child if born to the person adopting it in lawful wedlock," it is held that the adoption of a child by a testator operates as a revocation of a previously executed will. *Hilpire v. Claude*, 109 Ia. 159 (80 N. W. Rep. 332; 46 L. R. A. 171; 77 Am. St. Rep. 524). A devise over, in case she die without issue, of property devised by a testator to his daughter, is not revoked by her death before that of the testator, where a codicil subsequently executed did not revoke such devise over or provide otherwise for the disposal of the property. *In re Miller's Will*, 161 N. Y. 71 (55 N. E. Rep. 385). Under 12 S. C. Stat. at Large, p. 597, a devise of real estate is not revoked by the testator's subsequent conveyance of the same, where he reacquires the land before his death; and the statute applies although such subsequent conveyance was made to the devisee. *Gregg v. McMillan*, 54 S. C. 378 (32 S. E. Rep. 447).

**Section 915. Construction of wills—General principles.** A remainder over on the devise of a fee is inoperative and void. *Lambe v. Drayton*, 182 Ill. 110 (55 N. E. Rep. 189); *Cameron v. Parish*, 155 Ind. 329 (57 N. E. Rep. 547); *Brewster v. Douglas*, Ia. (80 N. W. Rep. 304); *Burton v. Gagnon*, 180 Ill. 345 (54 N. E. Rep. 279). See also § 252 in this volume. A devise of an absolute fee cannot be defeated or limited by other provisions in the will expressing the testator's desire as to the disposition the devisee should make of the property. *Hambel v. Hambel*, 109 Ia. 459 (80 N. W. Rep. 528); *In re Marti's Estate*, 132 Cal. 666 (61 Pac. Rep. 964). Even a direction made by the testator in his will in such a case, as to the disposition to be made of such of the property devised as remains undisposed of by the devisee, is void. *McNutt v. McComb*, 61 Kan. 25 (58 Pac. Rep. 965). The principle of this case is approved and applied in the case of *Boston*

*Safe-Dep. & T. Co. v. Stich*, 61 Kan. 474 (59 Pac. Rep. 1082). A power of alienation incident to a devise of an estate for life or an estate in fee simple cannot be cut down by a subsequent clause in the will. *Hunt v. Hawes*, 181 Ill. 343 (54 N. E. Rep. 953). A fee created by a devise of real estate to one and her heirs and assigns cannot be cut down by a subsequent clause in the will providing that she is to hold it for life. *Lambe v. Drayton*, 182 Ill. 110 (55 N. E. Rep. 189). Where the words of a residuary devise plainly pass the fee, other language in the will will not be construed to impute to the testator an intent to die intestate as to the residue, if such construction can be avoided. *Carter v. Gray*, 58 N. J. Eq. 411 (43 Atl. Rep. 711). Where one of several provisions in a will which form a general scheme for the disposition of the testator's property is void on account of violating the rule against perpetuities, the whole will is invalidated, although the other provisions, standing alone, would be valid. *Eldred v. Meek*, 183 Ill. 26 (55 N. E. Rep. 536; 75 Am. St. Rep. 86). A stipulation in a will will be held void for uncertainty where the language used by the testator is so indefinite that the court cannot ascertain his intention. *In re Willey's Estate*, 105 Wis. 22 (80 N. W. Rep. 102). A court will take judicial notice of the fact that sections eight and seventeen in a given township and range lie north and south of each other, and will not refuse to give effect to a testator's devise of all his land lying east of the center line running north and south "between" sections eight and seventeen, on account of the description being an impossible one, but will give effect to such devise and the evident intention of the testator by substituting the word "through" for the word "between." *Briant v. Garrison*, 150 Mo. 655 (52 S. W. Rep. 361). In case of a devise to a class as tenants in common, the shares of the members of the class dying before the testator do not lapse, but go to the other members of the class. *Gordon v. Jackson*, 58 N. J. Eq. 166 (43 Atl. Rep. 98). A precatory trust is not created by a will devising property absolutely to an insane asylum, by the testator's use of the words "my wish and will" in designating the use to which he would prefer to have his property applied. *Pratt v. Trustees of Sheppard & E. P. Hospital*, 88 Md. 610 (42 Atl. Rep. 51). A testator adding to his residuary devise of all

the rest and residue of his property to his wife the words, "believing that she will manage it judiciously, and perfectly satisfied that she will make a fair distribution of it among our children at her death," thereby does not create a precatory trust in favor of the children. *Cheston v. Cheston*, 89 Md. 465 (43 Atl. Rep. 768).

**Sec. 916. Construction of wills—Use of words "children" and "heirs"—Devises to a class.** Where a testator gave his property to his wife, and "child or children, or their heirs," who might be living at his death, but if he and his wife and his child or children should all die, and there should be no heirs of the children, then it should go to others, the word "heirs" will be construed to mean "children." *Fishback v. Joesting*, 183 Ill. 463 (56 N. E. Rep. 62). For case in which "heirs" is held not to mean "children," see *Hennegar v. Deadrick*, Tenn. (54 S. W. Rep. 138). The word "children" may be extended to include grandchildren, when such intent appears from the whole instrument, or where otherwise the devise would fail. *Edwards v. Bender*, 121 Ala. 77 (25 So. Rep. 1010). But the general rule is that the word is never used to include grandchildren, or other persons other than immediate descendants, in the absence of something showing a contrary intent. *Vaughan v. Vaughan's Ex'x*, 97 Va. 322 (33 S. E. Rep. 603); *Logan v. Brunson*, 56 S. C. 7 (33 S. E. Rep. 737); *Grant v. Mosely*, Tenn. (52 S. W. Rep. 508). Ordinarily the word "children" when used in a will means legitimate children, but it is held that a devise over to the "children" of a testator's son, as a class, will open up and let in an illegitimate child of such son after it has been legitimized, under Mo. Rev. Stat. 1889, § 4475, by his marriage with the mother of the child and his subsequent recognition of it. *Gates v. Seibert*, 157 Mo. 254 (57 S. W. Rep. 1065; 80 Am. St. Rep. 625).

A provision in a will that, in the event of the death of one or more of the devisees, his, her, or their share is given to those surviving, has reference to devisees who die before testator; hence devisees living at the death of testator take their shares freed from conditions. *Armistead's Ex'rs v. Hartt*, 97 Va. 316 (33 S. E. Rep. 616). Where a will devising land in trust for the benefit of one during his life,

the fee to pass to his lawful issue surviving him, provides that in case he leaves no lawful issue the land shall descend to and vest in the testator's heirs at law as if no will had been made, the heirs are to be ascertained as of the date of the testator's death. *Wadsworth v. Murray*, 161 N. Y. 274 (55 N. E. Rep. 910; 72 Am. St. Rep. 265). Where a devise is made to several persons as a class "to be paid to each upon his or her reaching his or her majority," the distribution must be made among those of the class who are in being at the time the eldest attains his majority. *Thomas v. Thomas*, 149 Mo. 426 (51 S. W. Rep. 111; 73 Am. St. Rep. 405; see pp. 413-440 for exhaustive note on "Gifts to a class, such as 'children,' and who are entitled to take"). If a will declares that "the issue of any deceased child" of the testator "shall take by representation the share which his, her, or their parent would have taken if living," the words "deceased child" refer only to such of the testator's children as die before he dies, and not to one who survives him and takes a vested remainder under the will, but dies before coming into possession. *Patton v. Ludington*, 103 Wis. 629 (79 N. W. Rep. 1073; 74 Am. St. Rep. 910). To the same effect is the case of *Miller v. Worrall*, 59 N. J. Eq. 134 (44 Atl. Rep. 890). Where a testator divided his estate into five equal shares, one of which he gives to each of his living children and one to the children of those deceased, such grandchildren take as a class and the survivor of them at the time of the testator's death takes the whole share, although he afterward died during his minority, and the will contained a provision that the minor heirs of deceased children should not come into possession or use of their shares until arriving at majority. *Brewster v. Mack*, 69 N. H. 52 (44 Atl. Rep. 811).

**Sec. 917. Construction of wills—Devise over in case devisee dies without issue.** A devise creating a life estate with remainder in case the life tenant dies "without issue," the quoted phrase means, without having had issue,—not without surviving issue. *Field v. Peeples*, 180 Ill. 376 (54 N. E. Rep. 304). A devise of realty to the testator's grandson, to pass to a religious organization in case the grandson dies without issue, creates an estate tail in the grandson with contingent remainder to the society. *Horton v. Up-*

ham, 72 Conn. 29 (43 Atl. Rep. 492). The general rule that the words "dying without issue" and similar expressions in wills refer to the death of the devisee before that of the testator, or during the existence of some particular estate provided for, upon the expiration of which the devise was to take effect, does not apply where the will contains controlling language indicating a different intent. *Cooksey v. Hill*, Ky. (50 S. W. Rep. 235; 20 Ky. Law Rep. 1873). Where a devise of lands otherwise absolute provides that if the devisees "should die without heirs" the lands should "revert back" to such of the testator's legal heirs as may be living at that time, the dying without heirs has reference to such a death after that of the testator, and not before; and the devisees take conditional estates only, subject to their being determined by their dying without heirs. *Jordan v. Hinkle*, 111 Ia. 43 (82 N. W. Rep. 426).

**Sec. 918. Construction of wills—Devise for life with power of disposal.** A life estate created by an express devise to that effect is not enlarged to a fee by the fact that the devisee is given power to change or modify specific bequests afterward made by the will, *In re Stumpenhousen's Estate*, 108 Ia. 555 (79 N. W. Rep. 376); nor by the fact that he is given power to dispose of the fee, *Lee v. Fidelity Trust & Safety-Vault Co.*, Ky. (57 S. W. Rep. 239); *Gibson v. Dubourg*, Ky. (57 S. W. Rep. 240). An estate for life is not enlarged to a fee simple by a provision in the devise creating it that the devisee is to have "full control \* \* \* with full power to deed to her grantees, their heirs and assigns, forever," where all the other provisions in the will clearly indicate that it was the purpose of the testator to invest the devisee with a life estate with power "to sell and dispose of so much \* \* \* as will insure her a comfortable living." *Morse v. Inhabitants of Natick*, 176 Mass. 510 (57 N. E. Rep. 996). A gift of power to dispose of the whole estate, annexed to an estate for life, with remainder over in fee to a third person, is not void for repugnancy, and confers upon the life tenant plenary power to convey the fee upon the terms of the power granted; and a general warranty deed executed by him for a consideration equal to the value of the

fee, and professing and evidencing an intention to convey the fee, is a valid execution of the power, without actual reference to its source. It is sufficient if the power exists. *Rinkenberger v. Meyer*, 155 Ind. 152 (56 N. E. Rep. 913). A devise by a testator of all his property to his wife "during her natural life, and at her death she can dispose of the property as she wants to," is held to give her an unlimited power of disposition including the right to convey the property before her death. *Mosely v. Stewart*, Tenn. (52 S. W. Rep. 671). A widow takes only a life estate in the realty, with no power to dispose of the reversion, under a devise to her by her husband of "all the residue of my estate, including all my property, both real, personal, or mixed, to have and to hold and dispose of as she may see fit, while she remains single, and, at her death or marriage, the remaining property is to be equally divided between my two daughters." *Russell v. Werntz*, 88 Md. 210 (44 Atl. Rep. 219). Where a testator's devise of real estate to his widow "to have, to hold and to enjoy, during her natural life, or so long as she shall remain my widow," provides that in case she "cannot support and maintain herself from my real estate, she is hereby authorized to sell the same and use the proceeds for her support and maintenance," such devise authorizes her to sell the title in fee, at her option. *Yetzer v. Brisse*, 190 Pa. St. 346 (42 Atl. Rep. 677). A devise by a testatrix of all her property to her husband in trust to be held and managed by him so as to produce the largest income, and which authorized him to use enough out of the income for his own maintenance and support in a comfortable living and for such charitable and benevolent purposes and gratuitous donations as he might think proper, it being provided that if necessary for any or all of these purposes, he might draw on the principal of the property, the property remaining at his death to go to other designated devisees, does not authorize the husband to resort to the principle of the property except when it is necessary to do so for his maintenance and support, and a conveyance of it for charitable purposes may be set aside by the beneficiaries of the trust. *Lehnard v. Specht*, 180 Ill. 208 (54 N. E. Rep. 315). Where, by the terms of his will, a testator provides that his wife should have the use and control, during her lifetime, of all the testator's property



not specifically bequeathed by him, and the power to dispose of the residue by will as freely as if it were a part of her own estate, and she fails to exercise the privilege thus given her, such residue will continue to remain a part of his estate, and descend to his heirs as intestate property. *Fogler v. Titcomb*, 92 Me. 184 (42 Atl. Rep. 360). For construction of particular devises for life or during widowhood, with power in devisee to use and dispose of the property, see *Shapleigh v. Shapleigh*, 69 N. H. 577 (44 Atl. Rep. 107); *Columbia Ave. Sav.-Fund, Safe-Dep., Tit. & T. Co. v. Lewis*, 190 Pa. St. 558 (42 Atl. Rep. 1094); *Small v. Thompson*, 92 Me. 539 (43 Atl. Rep. 509); *In re Tilton*, 21 R. I. 426 (44 Atl. Rep. 223); *Martin v. Barnhill*, Ky. (56 S. W. Rep. 160; 21 Ky. Law Rep. 1666).

**Sec. 919. Construction of particular wills—Estate devised.** A devise of all the testator's land to his children, "allowing my wife the use and maintenance upon said property during her life, or as long as she remains my widow," does not give her a life estate in the land. *Jackson v. Jackson*, 56 S. C. 346 (33 S. E. Rep. 749). Where, in his will, a testator specifically devised to one of his children the entire estate in a certain tract of land, and to each of the remaining children a life estate only in a particular tract, and then, in a general residuary clause, provided that the proceeds derived from the sale of all other property should be divided equally among his children, it is held that the residuary clause carried the fee simple of the lands in which only a life estate was specifically devised. *Sullivan v. Larkin*, 60 Kan. 545 (57 Pac. Rep. 105). For cases which depend upon particular facts and construe particular wills, as to estate devised, see *Oyster v. Orris*, 191 Pa. St. 606 (43 Atl. Rep. 411); *Koeffler v. Koeffler*, 185 Ill. 261 (56 N. E. Rep. 1094); *Ashton v. Great Northern Ry. Co.*, 78 Minn. 201 (80 N. W. Rep. 963); *Vaughan v. Vaughan's Ex'x*, 97 Va. 322 (33 S. E. Rep. 603); *Smith v. Usher*, 108 Ga. 231 (33 S. E. Rep. 876); *Campbell v. Weakley*, 121 Ala. 64 (25 So. Rep. 694).

**Sec. 920. Construction of particular wills—Miscellaneous cases.** The words "and also" in a devise of a definitely described tract of land to the testator's daughter "and

also" eighty-three acres on which "she now lives," for life, indicates an intention on the part of the testator to apply the limitations to the first as well as to the second tract. *Noble v. Ayres*, 61 O. St. 491 (56 N. E. Rep. 199). Where, after closing with a period the second provision in his will by which he devises and bequeaths certain real estate to his wife, the testator begins a new paragraph with the word "Thirdly," which contains no devising words but merely enumerates certain personal property clearly intended to be bequeathed to his wife "whilst she remains my widow," and closes the paragraph with a sentence giving directions as to the disposition of the real estate in case of her remarriage, the word "Thirdly" will be disregarded, and the will held to give the wife both the real estate and personalty during her life of widowhood. *Rose v. Hale*, 185 Ill. 378 (56 N. E. Rep. 1073; 76 Am. St. Rep. 40). A devise by a testator of "the homestead and lands and premises belonging thereto upon which I now reside," may embrace another smaller tract of land used by him in connection with the lands upon which he resides as a homestead, although not contiguous thereto. *Lord v. Simonson*, N. J. Eq. (42 Atl. Rep. 741). A devisee of land takes subject to an irrevocable license to take water from a spring thereon, subsequently executed by his testator, so long as the licensee conforms to the terms thereof. *In re Fuller's Estate*, 71 Vt. 73 (42 Atl. Rep. 981). Under a devise by a testatrix to her first husband's stepmother, naming her, and her children, they all take concurrent interests, in the absence of any indication in the will that the testatrix intended that the stepmother should take a life estate and the children the remainder; and upon the death of some of the children before the testatrix, their interests pass to the other members of the class. *Gordon v. Jackson*, 58 N. J. Eq. 166 (43 Atl. Rep. 98). Where a testator having only two tracts of land devises them to one, using descriptive words indicating that he has them only in mind, and makes a residuary devise of the balance of his property to others, after-acquired real estate will pass to the residuary devisees. *Hines v. Mercer*, 125 N. C. 71 (34 S. E. Rep. 106). Particular devise held void as being in violation of 1 N. Y. Rev. Stat., p. 726, §§ 37, 38, prohibiting the accumulation of rents and profits of real estate and of the income of personal

property except during the minority, and for the sole benefit, of minors. *Hascall v. King*, 162 N. Y. 134 (56 N. E. Rep. 515; 76 Am. St. Rep. 302). For cases which depend upon particular facts and construe particular wills, see, as to when a devise in remainder takes effect, *Harding v. Harding*, 174 Mass. 268 (54 N. E. Rep. 549); as to the rights of posthumous children, *Clark v. Benton*, 124 N. C. 197 (32 S. E. Rep. 555); *Clark v. Denton*, 124 N. C. 200 (32 S. E. Rep. 556); as to right of life tenant in possession, *Colliver v. Taylor*, Ky. (51 S. W. Rep. 432; 21 Ky. Law Rep. 553); as to right of widow to possession during minority of children, *Bunch v. Ray*, Ky. (49 S. W. Rep. 336; 20 Ky. Law Rep. 1373); as to passing of property as undeviseed estate, *Richardson v. Young*, Ky. (55 S. W. Rep. 713; 21 Ky. Law Rep. 1481); as to power of trustee to sell corpus of estate for support of beneficiaries, *Mills v. Michigan Trust Co.*, 124 Mich. 244 (82 N. W. Rep. 1046).

**Sec. 921. Devises and bequests in lieu of dower—Election—Statutes construed.** A widow electing to accept a provision made for her in her husband's will, thereby does not estop herself from asserting a resulting trust in lands, title to which was taken in her husband's name, on account of her having furnished a part of the purchase price, where the will does not attempt to devise her interest in the land. *Bible v. Marshall*, 103 Tenn. 324 (52 S. W. Rep. 1077). Nor does a widow's election to take under her husband's will made in order to fix her rights in his estate preclude her from asserting title to property owned in her own right at the time of the making of the will, on the ground that disposition thereof could be claimed under the terms of the will, where it does not appear clearly that the testator intended to dispose of property which did not belong to him. *Cameron v. Parish*, 155 Ind. 329 (57 N. E. Rep. 547). Where a surviving husband not only filed an election to take under the will of his deceased wife, but received benefits under the will, and, though served with notice of the filing of the final report of the executrix, and of her application for discharge, made no objection thereto, he will be deemed to have made an election. *Brightman v. Morgan*, 111 Ia. 481 (82 N. W. Rep. 954). Ind. Rev. Stat.

1894, § 2666 (Rev. Stat. 1901, § 2666) construed and applied—election by widow. *Whetsell v. Loudon*, 25 Ind. App. 257 (57 N. E. Rep. 952). Construing and applying Mich. Comp. Laws 1897, §§ 8935, 8936, it is held that a widow who fails for more than a year after her husband's death to commence proceedings for the assignment of dower, and petitions the probate court to proceed under the will, thereby elects to take under it. *Koster v. Gellen*, 124 Mich. 149 (82 N. W. Rep. 823). The failure of a widow to elect, under Minn. Gen. Stat. 1894, § 4472, to renounce a provision made for her in the will of her deceased husband, and take under the statute, does not have the effect of giving her late husband's judgment creditor a lien on the land which would descend to her under the statute, and the lien of such judgment is in no manner affected by her election or failure to elect. *New Hampshire Sav. Bank v. Barrows*, 77 Minn. 138 (79 N. W. Rep. 660). Creditors of a husband cannot renounce for him a provision for him in his wife's will, so as to entitle him to share in her property, as provided by Miss. Code 1892, § 4497, where no provision is made for him. *Carter v. Harvey*, 77 Miss. 1 (25 So. Rep. 862). Utah Rev. Stat. 1898, §§ 2731, 2826-2829 construed and applied—rights of surviving wife—power of husband to dispose of property by will—election by widow. *In re Little*, 22 Utah, 204 (61 Pac. Rep. 899).

**Sec. 922. Election of a widow by acts in pais.** Although the statute provides for a formal election by the widow whether she will take under the will of her deceased husband, in lieu of the share which the law gives her, an election may be made by acts in pais; and hence the record is not the only proof of such election. *Reville v. Dubach*, 60 Kan. 572 (57 Pac. Rep. 522). The court say: "One of the important questions before the trial court was whether or not the widow elected to take under the will. No record of such an election was found in the probate court, and the contention of the Dubachs is that the record of that court is the only evidence by which an election can be established. This view was sustained by the trial court, and much of the testimony offered tending to show an election in fact was excluded. In this there was error. It seems to be well settled that an election may be made by acts in pais, and if

the acts are plain and unequivocal, and done with full knowledge of the widow's rights and of the condition of the estate, it is as binding as though it were formally made. If she makes a deliberate and intelligent choice under the will, and thereafter proceeds as though an election were made, she is estopped from claiming under the statute. So, it has been held 'an election by a widow to take under her husband's will, in lieu of a dower at law, may be evidenced by matter in pais as well as of record; but it must be shown that she had requisite knowledge of the value and character of her husband's estate, and that her intention was consistent with such choice.' *Bradford v. Kent*, 43 Pa. St. 474. In *Thompson v. Hoop*, 60 O. St. 480, a question somewhat similar to the one we are now considering was involved. There was a devise of real estate to a widow for life, and the remainder in fee to a son. The widow failed to formally make an election to take under the will, as the statute prescribes, but actually and in fact took under the will, and had the use and occupancy of the land devised for a series of years, and it was held that she was estopped to deny her election to take under the will. *Stilley v. Folger*, 14 Ohio 610, is cited as an authority to show that the only mode of proving an election is by the record, unless the record is lost or destroyed. This statement of the law is disapproved by the supreme court of that state in subsequent decisions. In *Millikin v. Welliver*, 37 O. St. 460, it is said that the decision in *Stilley v. Folger*, 14 Ohio 610, seems at variance with *Thompson v. Hoop*, 6 O. St. 480, and numerous other cases where an estoppel in pais was proven and held effectual. Although the question has not been directly adjudicated in this court, *Sill v. Sill*, 31 Kan. 248 (1 Pac. Rep. 556), and *James v. Dunstan*, 38 Kan. 289 (16 Pac. Rep. 459; 5 Am. St. Rep. 741), recognize the doctrine of implied election, and that the widow may thereby be estopped from claiming in opposition to such election. See, also, *Craig's Heirs v. Walthall*, 14 Grat. 518; *Chace v. Gregg*, Tex. Civ. App. (31 S. W. Rep. 76); *Nimmons v. Westfall*, 33 O. St. 213; *Rawley v. Sanns*, 141 Ind. 179 (40 N. E. Rep. 674); *In re Smith's Estate*, Cal. (38 Pac. Rep. 950); *Burroughs v. De Coutts*, 70 Cal. 361 (11 Pac. Rep. 734); *Reed v. Dickerman*, 12 Pick. 146; *Watson v. Watson*, 128 Mass. 152; *Clay v. Hart*, 7 Dana 1; 6 Am. &

Eng. Enc. Law 254; 1 Pom. Eq. Jur., §§ 514, 515. Our own cases as well as the other cited authorities, require that proof to sustain an implied election shall be clear and satisfactory. The acts and declarations relied upon must be unequivocal, and must clearly evince an intention to elect and take under the will, and the choice must be made by the widow with the full knowledge of her rights and of the status of the estate. If, after she has ascertained her rights, and what she would acquire under the law, as well as by the will, she deliberately proceeds as though an election had been made, accepts the benefits of the will, and actually takes under it, she will be concluded, and will not be heard to say that no election has been made. In the present case the widow filed a written petition in the probate court, asking that the will be admitted to probate, and that such other proceedings might be had thereon as would establish and make valid the will in law. It is claimed that at the same time and accompanying this act statements were made by her of a positive and unmistakable character, showing an intention to elect and the fact of an election. This testimony strongly tended to show an election by the widow, and its exclusion was error. Proof that she occupied and used the entire farm, and received the rents and profits therefrom, was material to the case, and should have been received. We cannot determine at this time how much proof will be required to show an election, nor that the testimony offered and excluded would have been sufficient for that purpose. Parties claiming an election are entitled to produce such competent proof as they may have to sustain an election, and the court or jury trying the case can then determine, under the rules of law, whether the facts are sufficient to constitute an election."

**Sec. 923. Miscellaneous notes.** Where a testator fixes a value upon land devised, for the purpose of division under the will, the devisee must take the land at the value fixed. *Chamberlain v. Berry's Ex'r*, Ky. (56 S. W. Rep. 659). Where equality manifestly is intended by a testator's devise of property in which he provided for its appraisement and division by commissioners, the property should be valued as of the date of the appraisement, and not as of the time of the testator's death, where it is made within a

reasonable time after such event. *East v. Burns*, 104 Tenn. 169 (56 S. W. Rep. 830). A will by a wife devising all her property to her husband if he survive her, otherwise to her bodily heirs, operates to disinherit her after-born child if her husband survive her, so that such a child cannot claim any rights under Shannon's Tenn. Code, § 3925. *Reaves v. Hager*, 101 Tenn. 712 (50 S. W. Rep. 760). A creditor who elects to accept a provision in a will in satisfaction of his claim, and thereby comes in under the will, has no right superior to the creditors of the estate. *Jones v. Shomaker*, 41 Fla. 232 (26 So. Rep. 191). Until the probate of a will, devisees claiming title to property thereunder cannot enjoin real actions affecting the same brought by the testator's heirs at law; nor can they test the validity of the will in another proceeding. *Pratt v. Hargreaves*, 76 Miss. 955 (25 So. Rep. 658; 71 Am. St. Rep. 551). Construing 3 N. J. Gen. Stat., p. 3760, § 19, giving to a posthumous child of a testator unprovided for by his will the same rights as though the testator had died intestate, does not destroy a devise in trust to an executor with power of sale. *Van Wickle v. Van Wickle*, 59 N. J. Eq. 317 (44 Atl. Rep. 877). An oral contract to devise realty which has been taken out of the statute of frauds by part performance may be enforced specifically. *Alexander v. Alexander*, 150 Mo. 579 (52 S. W. Rep. 256).

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